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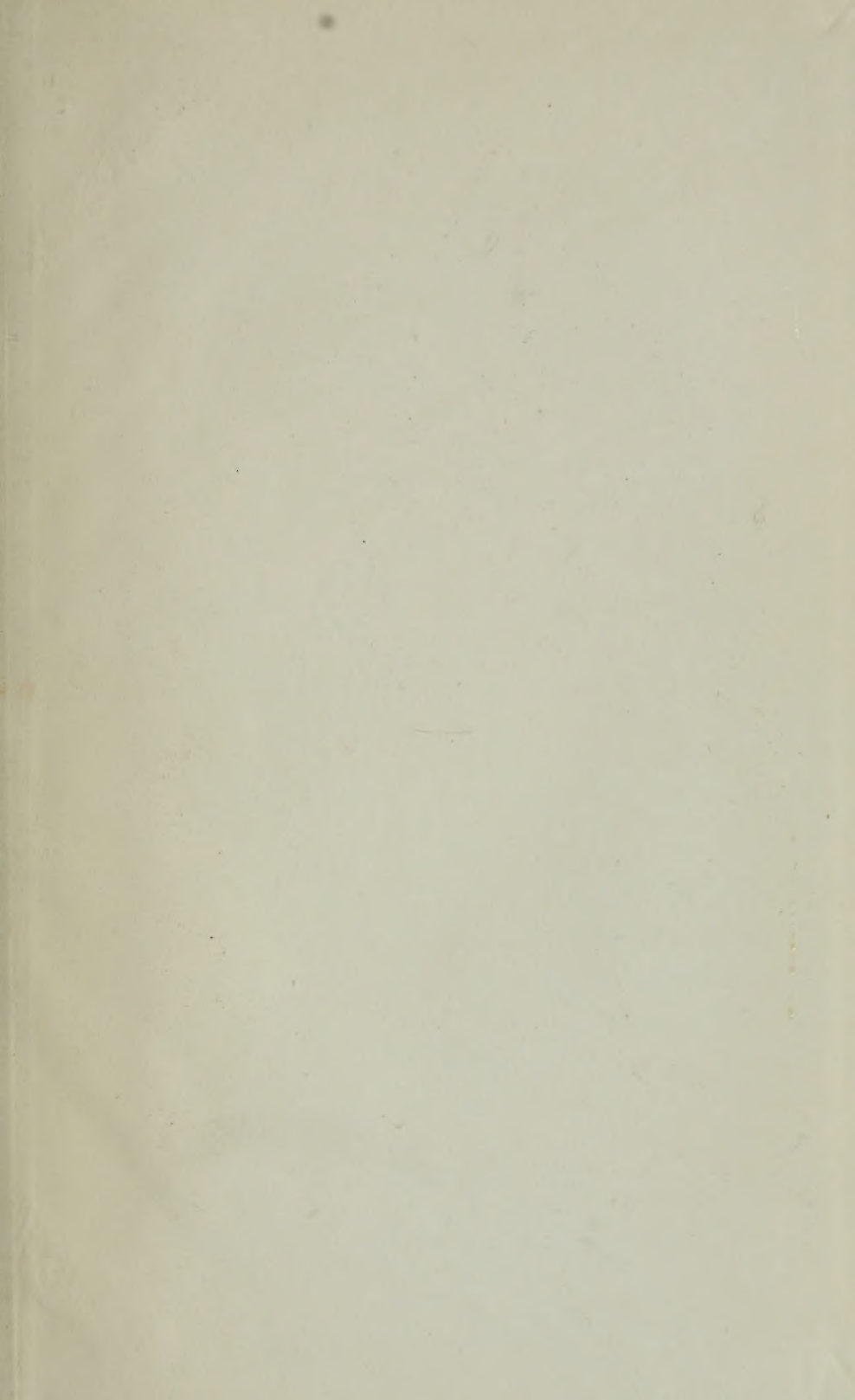
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2523
No. 11892

United States
Circuit Court of Appeals
For the Ninth Circuit.

PARAMOUNT PEST CONTROL SERVICE, a
corporation,

Appellant,

vs.

CHARLES P. BREWER, individually and doing
business as Brewer's Pest Control, ROSALIE
BREWER, his wife, RAYMOND RIGHT-
MIRE, CARL DUNCAN and EARL MER-
RIOTT,

Appellees.

Transcript of Record

IN TWO VOLUMES

VOLUME I

Pages 1 to 266

Upon Appeal from the District Court of the United States
for the District of Oregon

FILED
JUN 2 - 1948

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PARAMOUNT PEST CONTROL SERVICE, a
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
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KENNETH C. GILLIS,
Central Bank Building,
Oakland, California

F. LEO SMITH,
Pacific Building,
Portland, Oregon

ROBERT R. RANKIN,
Yeon Building,
Portland, Oregon
For Appellant.

COLLIER & BERNARD,
WM. K. SHEPHERD,
EARL F. BERNARD,
Spalding Building,
Portland, Oregon.

PLOWDEN STOTT,
Yeon Building,
Portland, Oregon,
For Appellees.

In the District Court of the United States for the
District of Oregon

No. Civ. 3936

PARAMOUNT PEST CONTROL SERVICE,
a corporation,

Plaintiff,

vs.

CHARLES P. BREWER, individually and doing
business as Brewer's Pest Control, ROSALIE
BREWER, his wife, RAYMOND RIGHT-
MIRE, CARL DUNCAN, EARL MERRIOTT
and all other persons associated with said de-
fendants as herein described,

Defendants.

COMPLAINT IN EQUITY

Comes now plaintiff and for cause of suit against
defendants, complains and alleges:

I.

Plaintiff is a citizen of the State of California
and defendants are all citizens of and residents in
the State of Oregon. The matter in controversy is
the restraint of unlawful conduct performed by
the defendants within the District of Oregon, the
recovery of sums of money due the plaintiff, and for
damages by defendants, all of which exceeds, ex-
clusive of interest and costs, the sum of Three
Thousand (\$3,000.00) Dollars.

II.

Plaintiff was and at all times since July 1, 1946, has been and now is a private corporation, organized under and existing by virtue of the laws of the State of California, with a principal office and place of business in the City of Oakland, County of Alameda, State of California.

(a) On or about August 25, 1947, said plaintiff qualified to do business in the State of Oregon by filing a verified declaration of its desire and purpose to engage in business in said district and state, together with a duly authenticated copy of its Charter or Articles of Incorporation, and did appoint a general agent and statutory attorney-in-fact who is a citizen of and resident in Multnomah County, Oregon, and did pay a fee for the filing of its declaration and proportionate [1*] part of the annual license fee for the year ending June 30, 1948, all of which was so satisfactory in substance and form to the Corporation Commissioner of said State of Oregon, that said official did on or about August 25, 1947, issue to plaintiff, under his official hand and seal, a Certificate of Authority to engage in business within the State of Oregon, and said corporation did establish a branch office and place of business in the said City of Portland.

(b) In addition to the general powers granted to and vested in plaintiff by the statutes of the states in which it does business, said plaintiff is, among other things, particularly organized for and author-

* Page numbering appearing at foot of page of original certified Transcript of Record

ized by its Articles to carry on the business of structural pest control, make inspections, use insecticides, fumigants, or allied chemicals for the purpose of eliminating, exterminating or preventing infestation of insects, rodents and fungi and other pests invading households or structures, and to buy ingredients, manufacture chemicals and formulae, use and sell the same, together with all kinds of machinery or devices for carrying on the business of structural pest control, and to create and apply for licenses, trademarks and processes, to manufacture and sell all types of chemicals and chemical compounds used in said business, and generally to transact or carry on any other powers necessary, proper or convenient to carry into effect the foregoing purposes, including the establishment of branches in other states than California, and for more than a year last past said plaintiff has been engaged in the above described business in the State of Oregon.

(c) Plaintiff has at substantial expense, at great labor and research, coupled with untiring effort, assembled for its private and confidential use, a large number of most valuable and useful receipts and formulae known and used by plaintiff in its business, and has acquired valuable and technical knowledge and experience necessary and requisite for the proper combining, mixing and compounding of the same, and knowledge of dependable sources of supply for obtaining ingredients and the strength and value thereof. For the same period and in the same [2] manner and for the purpose of pest con-

trol, it has acquired extensive and valuable knowledge of various use of its products and the best means of distribution thereof to best control all kinds of pests in various localities, structures and places infested thereby which are dangerous to the life, health or property of customers of plaintiff, and said antecedent knowledge is essential to the successful conduct of such business and particularly that of plaintiff, and such knowledge is a valuable trade asset of plaintiff and is by plaintiff disclosed in whole or in a substantial part to its employees, including the defendants above named, at the commencement of and during their training in behalf of plaintiff's business.

(d) In order to carry on said business in a unique, sanitary, safe, efficient and exclusive manner, plaintiff does

(i) issue to all agents, employees and representatives certain rules and regulations regarding its employees, their conduct, the method of serving, chemicals and their use and care, and the names and addresses of accounts or parties whom the plaintiff is to serve and the contract to be made for their particular guidance in said business, and plaintiff does require its employees to secure from said customers certain written contracts for service of customers which, among other things, therein describe the pest to be eradicated or controlled, the price therefor and terms of payment and the period during which said service is to continue;

(ii) make written agreement, often termed a franchise, with its principal agent for the sole and exclusive service by said agent to plaintiff, which service is confined to a particular territory and fully defines the relationship, as more particularly hereinafter disclosed;

(iii) make agreements with its employees to the end that in view of their training by the plaintiff, said employees will not give out information regarding plaintiff's business, as is more fully hereinafter set forth, all of which procedure herein described was [3] followed and performed by plaintiff in establishing its herein described business in the state and district of Oregon;

(iv) services its patrons with what is colloquially called "one shot service," meaning isolated single service, or more often under written contracts giving the price, terms of payment, duration of service, pest to be controlled and period of service. Said contract service greatly exceeds the single shot service. All such procedure was instituted and practiced by plaintiff and subsequently usurped, instituted and practiced by said defendants in the State of Oregon.

III.

All of said defendants were to a greater or less extent materially familiar with plaintiff's business, as above described, and were associated together and more particularly identified in the public and customers' minds, as well as among themselves, with plaintiff's business in the following manner:

(a) On or about July 1, 1946, plaintiff employed and defendant Charles P. Brewer accepted and agreed to act as agent for plaintiff in the State of Oregon in the business aforesaid, under a sole and exclusive franchise to render service for and the sale and use of the products of plaintiff in the business aforesaid for a period of ten (10) years after said date, cancellable on ninety (90) days' written notice by either party, to the effect that the agent would devote the whole of his time, attention and energies to promote the interests of the company, to take all contracts for service in the name of the company, to purchase his stocks, merchandise and chemicals from the plaintiff, to procure the sales of products and promote the service of the plaintiff in the territory allotted and to hold confidential the information given him in connection with the plaintiff's business, to be responsible for all accounts and the collection thereof and not to directly or indirectly communicate or divulge to anyone or make use of any of the trade secrets, formulae, processing and service of plaintiff's business for the benefit of anyone other than the [4] plaintiff, and to pay a proportionate amount of the business to the plaintiff and upon the termination of this agreement and for a period of three (3) years thereafter to not directly or indirectly communicate or divulge to or make use of for the benefit of any person, partnership or corporation any of the trade secrets, formulas, processing methods of the company, or the names, addresses or requirements of any of the customers of the company, or any other information

relating to the company's business which he may have acquired or learned during his employment, and will not canvass, solicit or cater to any of the customers of the company which he may know of because of his employment by said company, which at all times herein mentioned refers to the plaintiff, and which agreement contained other provisions, as more fully set forth in that certain "Sales Agent's Agreement with Paramount Pest Control Service" dated July 1, 1946, made and entered into for a valuable consideration, with plaintiff therein called the "Company" and defendant Charles P. Brewer therein called the "Agent," and subsequently ratified and confirmed, of which agreement, also called "franchise," a substantial copy in words, letters and figures is hereto attached and its allegations by this reference incorporated herein and made a particular part of this paragraph of this complaint and for reference marked "Exhibit 1."

That said agreement was on the following dates in the following manner, verbally modified, ratified and augmented:

(i) Defendant C. P. Brewer and plaintiff, through its president, on or about September 20, 1946, at Portland, Oregon, at the special instance and request of defendant Brewer and on his representation that it was too difficult to expand said business and do all the things he wanted to do to make a success of said business in Oregon and yet pay to the plaintiff the 20% of the gross business done by the agent, as specified in said contract or franchise,

did orally agree to modify said franchise in the following particulars only, to wit:

That every time defendant C. P. Brewer took any money for his [5] personal use from the business done by him under said franchise, he would pay to plaintiff a like sum of money; that such an arrangement would be retroactive to July 1, 1946, and continue up to January 1, 1947, by which time defendant Brewer would be profitably established. Such arrangement was made by plaintiff under the still continuing confidence in the ability and integrity of defendant Brewer and with the understanding that defendant Charles P. Brewer was making and would continue to make a profit and would not draw out any money except as said business would warrant said total withdrawal, and in all other particulars the provisions in said franchise contained would continue in full force and effect.

Under the above modification, an indebtedness from defendant Charles P. Brewer to plaintiff of some \$1,200 to \$1,500 was forgiven, the exact amount of which is known to said defendant.

(ii) On January 1, 1947, said franchise was again in full force and effect, and during the months of January and February of 1947 there became due and owing thereunder to plaintiff from defendant Brewer the total sum of \$994.25 upon which defendant C. P. Brewer made a payment on February 6th of \$250.00, and again on March 6, 1947, he paid \$250.00, making a total of \$500.00 payment, and the balance of \$494.25 was paid March 13, 1947, but

the franchise obligations for the months of March, April, May, June and July, amounting to the sum of \$2,675.41 were not paid and demand was made therefor upon the defendant Charles P. Brewer and he refused to pay the same, and on or about June 20, 1947, at the special instance and request of defendant Charles P. Brewer and under plaintiff's continuing confidence in his sincerity, ability and integrity, plaintiff and defendant Charles P. Brewer again made a mutual modification of the terms of payment of said franchise and did compromise all sums due under said franchise and its part time modification, and agreed that for the period from July 1, 1946, to June 30, 1947, the total sum of money due, owing and unpaid by defendant Charles P. Brewer to plaintiff was \$3,359.61, and said compromise was satisfactory [6] and agreed to by the defendant Charles P. Brewer, and upon which he made a payment of \$259.61 on July 9, 1947, and, with other credits allowed, left a balance of money still due, owing and unpaid by defendant Charles P. Brewer to plaintiff of \$2,507.41, for which demand has been made, and defendant Charles P. Brewer has failed, neglected and refused to pay the same.

(iii) Said franchise agreement had never been cancelled by either party and was ratified by payments as aforesaid and was from July 1, 1947, up to and including August 1, 1947, in full force and effect and under the terms thereof defendant Charles P. Brewer owed the plaintiff for said month of July, 1947, the sum of \$478.15 for which demand has been made and which is now due, owing and unpaid.

(iv) Still having confidence in the ability and integrity of defendant Charles P. Brewer and at his special instance and request and as an aid by the plaintiff to said defendant in building up the business to the profit of both parties and because defendant Charles P. Brewer complained he could not do it alone, plaintiff and defendant Charles P. Brewer on or about January 20, 1947, at Portland, Oregon, agreed to augment said franchise agreement with additional help and compensation, and mutually and orally agreed as follows:

Plaintiff would and did send a salesman and serviceman from its main office at Oakland, California, to Eastern Oregon territory to there and then build up a mutual business, and plaintiff would pay the salaries and expenses thereof in the first instance, and any profit or loss and expense of said venture would be shared equally between plaintiff and defendant Charles P. Brewer;

That the total expense of said undertaking was \$1,921.74 of which defendant's share was \$960.87 and the immediate proceeds from said undertaking, not including the future benefits to the said business thereby established, was \$1,317.00 of which plaintiff was entitled to one-half or \$658.50, or a total amount due plaintiff from defendant under this special contract of \$1,619.37, and demand has been [7] made for said sum due, owing and unpaid and defendant Charles P. Brewer has refused to pay the same.

(b) That defendants Raymond Rightmire and Carl Duncan are both residents of and inhabitants

in the State of Oregon and were employed by plaintiff for some time prior to July, 1947, and each for himself and as a condition of employment did sign and deliver to plaintiff its agreement in writing in words, letters and figures substantially as follows, to wit:

“Because I do have a limited knowledge of the exterminating, pest control, or termite business, and do not know any formulas, processes, methods, or other trade secrets, thereof, I agree not to give out any learned information such as formulas or customs, or to go to work for any other pest control firm for a period of three (3) years after the termination of my employment with this company, in the district in which I am now working.”

(c) Defendant Rosalie Brewer is now and at all times herein mentioned was the wife of the defendant, Charles P. Brewer, and a resident of and an inhabitant in the State of Oregon and was bookkeeper for said defendant and in partial management of plaintiff's office at Portland, Oregon, and in complete management upon the absence of defendant Charles P. Brewer, and was authorized to and did sign checks of the plaintiff, together with her defendant husband, and either in whole or in part substantially and materially knew all of the matters and things herein alleged in connection with plaintiff's business and did participate in depriving plaintiff of its business, as hereinafter more fully alleged.

(d) Defendant Earl Merriott is now and at all times herein mentioned has been a resident of and an inhabitant in the State of Oregon and was employed by plaintiff on or about February 3, 1947, through the action of defendant Charles P. Brewer who, had he done as required by his agreement, would have signed defendant Merriott upon a contract similar to that of said defendants Duncan and Rightmire, but defendant Merriott knew all, or substantially all, of the matters and things herein alleged and was particularly familiar with formulas, methods, chemicals [8] and service of plaintiff, and elected to associate himself with the defendants, as hereinafter described.

IV.

Said defendants were for various periods of time prior to August 1, 1947, either in the employment or service directly or indirectly of plaintiff and thereby possessed of the knowledge of plaintiff's business, its chemicals, methods of application, all as above described, and all the patrons and customers of plaintiff and their addresses who were either under contract with or served by the plaintiff; that said employment of defendants by plaintiff terminated by voluntary act of defendants in accordance with the scheme hereinafter described, on August 1, 1947, and for some time prior thereto and during their employment, the exact time being to the plaintiff unknown, defendants and each of them with the others did combine, conspire, confederate, agree and cooperate among themselves and with each other to do the following things:

(1) to breach and refuse to perform their individual contracts and agreements or employment with this plaintiff and to aid and assist each other in such purpose and scheme;

(2) to acquire for themselves and for the benefit of each other and their joint association all the knowledge defendants could of plaintiff's business, chemicals, formulae, material and methods, as hereinabove described, together with the names and addresses of all patrons and customers or contacts of plaintiff;

(3) to serve plaintiff's customers well and thereby to build up a good will for themselves thereafter, where the customer would know only the attending defendant or defendants as the party serving said customer in the work of pest control and to thereby be able by such personal contact to later acquire this account for their own use and benefit and to the exclusion of that of the plaintiff;

(4) for themselves to take over, acquire, hold and serve permanently all the customers and patrons of plaintiff immediately upon the [9] termination of their employment which they then and there contemplated doing when they had sufficiently established their own good will with customers of plaintiff which was to be done during a period of three years immediately following the termination of their employment and to take unto either their association or to themselves all money of the plaintiff, its methods, chemicals, systems, service, patrons, business, equipment and profits and place themselves in relation to the customer in the identi-

cal position previously occupied by plaintiff, and to do for all customers of plaintiff the identical or similar service which they had performed while in the employ or association with plaintiff so that in the customers' mind there would be no distinction in the matter of service;

(5) to cause customers or patrons of plaintiff to break their contracts with plaintiff or to cease their single shot service in favor of themselves and to advise and represent to patrons that plaintiff was liquidating or going out of business or no longer serving them, and that they were taking over the business and would carry on in identically the same efficient and satisfactory manner as they had previously done and to do so quickly and effectively, thereby intending to acquire said plaintiff's business prior to the time the plaintiff would have any opportunity to reestablish its business, procure the necessary trained personnel involved in its service and the equipment necessary to serve the customers either under contract or single shot service and thereby defendants would acquire all the business of plaintiff;

(6) to ignore the territorial limits of said franchise and go into the states of Idaho or Washington and by application of plaintiff's products, methods and equipment to establish for themselves a business in said localities;

All of which conspiracy, scheme and plan said defendants are now performing and carrying into effect by their joint and several action. [10]

V.

To effect said conspiracy and scheme of self-enrichment, defendants, either jointly or severally, but always with the purpose of aiding and abetting their organization and each other, did do and accomplish the following overt acts, to wit:

(1) On July 24, 1947, and after defendant Charles B. Brewer felt himself sufficiently entrenched in the favor of the customers of said plaintiff, said defendant Charles P. Brewer did in writing and without the ninety days' notice specified in his contract, make, sign and deliver an instrument terminating his franchise as of August 1, 1947, of which the following in words, letters and figures is substantially a copy:

“July 24, 1947.

“Mr. T. C. Sibert

638 - 16th St.

Oakland 12, Calif.

“Dear Ted:

“Will you please except my resignation and the termination of my franchise as of August 1, 1947.

“I will, before August 1, take inventory of all supplies and equipment owned by me, so that we will be able to effect a cash settlement at that time. If you care to buy my equipment that will be alright with me, otherwise I'll keep it as I could maybe use it in the future.

“Please advise me as to whether you want to audit the books, or if I should have it done here by a registered C.P.A.

Respectfully yours,

CHARLES P. BREWER.”

(2) took all the chemicals and equipment previously used and continuing to use some parts thereof by delivering some and keeping the residue.

(3) Defendant Charles P. Brewer bought from a third party an automobile with plaintiff's money, taking the same in his own name and mortgaging it to a bank whereby repossession by plaintiff was prevented, which automobile he continues to use in the business of said defendants.

(4) Defendant, Rosalie Brewer, under the conspiracy and scheme [11] herein described, did make, execute and acknowledge on July 30, 1947, a certain “Certificate of Assumed Business Name” wherein the said Rosalie Brewer (she not being under the same contract or franchise with her husband) did falsely and fraudulently declare that the real and true names and post office addresses of the persons conducting, having an interest in or intending to conduct the business of pest control under the name and style of “Brewer Pest Control” located at Portland, Multnomah County, Oregon, were the following, to wit: “Rosalie Brewer, post office address 4929 Northeast 28th Avenue, Portland, Oregon,” which assumed business name defendants caused to be recorded in Book 61, Record

of Assumed Business Names of Multnomah County, Oregon, at page 212 thereof.

Subsequently, at an appropriate time, when defendants felt they were no longer in danger of any action on the part of this plaintiff, the said defendant Rosalie Brewer did on, to-wit, August 27, 1947, make, sign and acknowledge a "Certificate of Retirement" stating falsely and fraudulent that she no longer had any interest or business in "Brewer's Pest Control," and concurrently with said defendant Rosalie Brewer filing her Certificate of Retirement, the said defendant Charles P. Brewer did falsely and fraudulently file a "Certificate of Assumed Business Name" in which he declared that the person conducting, having an interest in and intending to conduct the business of pest control under the assumed business name of "Brewer's Pest Control" was "Charles P. Brewer, post office address 4929 N. E. 28th Avenue, Portland 11, Oregon";

All of the above described action being in furtherance and execution of the conspiracy and association hereinabove described, and defendant Charles P. Brewer continues to operate under said alleged assumed name, and all of said defendants have solicited, served and applied plaintiff's methods and products under the name of "Brewer's Pest Control" or similar identification of their association.

(5) That the above described action of acquiring said business [12] of plaintiff was by defendants Charles P. Brewer, Raymond Rightmire and Carl

Duncan done knowingly and intentionally, contrary to and in violation of their agreement not to go to work for any other pest control firm for a period of three years after the termination of their employment with plaintiff company in the district in which they were working, and defendants Rosalie Brewer and Earl Merriott were knowingly and intentionally aiding and abetting, under their scheme and conspiracy for self-enrichment, the said defendants Charles P. Brewer, Raymond Rightmire and Carl Duncan in the manner hereinabove alleged.

(6) That all of said defendants knowingly and intentionally aided defendant Charles P. Brewer in the violation of his franchise contract in the following particulars:

(a) In not serving the Company faithfully, diligently and in accordance with his best abilities in all respects and in not using his utmost endeavors to promote the interests of the Company;

(b) did not take all contracts for work and service to be rendered by the Agent to customers in the name of the Company;

(c) did not aid in causing the proceeds of said service to be paid to plaintiff and did not pay any sums arising from said business to plaintiff;

(d) in not purchasing all of his supplies from the plaintiff;

(e) did not use every effort in the promotion and sale of the products of plaintiff or do what-

ever was necessary or required by the plaintiff to increase the business of said plaintiff;

(f) did take from the records of the plaintiff the private information of plaintiff, including copies of the names and addresses of customers, and used it against the plaintiff and in furtherance of their own business;

(g) did not deliver up to the plaintiff on demand all of the property, cards, information, stock, merchandise, chemicals, equipment or instrumentalities used in connection with said business;

(h) while making collections, did not make himself responsible [13] for all accounts served in his territory and for the collection thereof and for all men working for or under him in said territory;

(i) by canvassing, soliciting or catering to any and all of the customers of the plaintiff which he had known because of his employment by said plaintiff;

(j) by taking to themselves rather than protecting trade secrets, formulas, methods, processes and the like and all customer lists, operation data discovered, acquired or prepared during their employment, as the sole property of the Company.

That all of said defendants, since the cessation of their employment with the plaintiff and under the conspiracy and scheme herein alleged, have done the identical or similar service for the de-

fendant Charles P. Brewer or their organization which they did and performed for this plaintiff and which service is done for their personal and associated enrichment and benefit and have taken unto themselves all of the business created by the plaintiff through its agents and employees and intended to be and previously acknowledged by said defendants as the business solely owned and served by the plaintiff.

VI.

That a full and complete accounting and statement of the obligations due, owing and unpaid to plaintiff from said defendants, individually or collectively, is as follows:

(1) From Defendant Charles P. Brewer:

(a) Balance due under the settlement as of June 30, 1947, from defendant Charles P. Brewer to plaintiff, \$3,100.00;

(b) Due, as aforesaid, on the July 1947 franchise account, \$478.15;

(c) Investment of plaintiff, which was a total investment in furniture, fixtures, equipment and tools that were on the territory at the time Charles P. Brewer took his franchise and which he received, \$1,259.63;

(d) Defendant Charles P. Brewer failed to turn in the [14] balance of the assets herein-after mentioned and which plaintiff would prefer in kind, but which was of the reasonable sum of \$973.00;

(e) Under the modified agreement between defendant Charles P. Brewer and plaintiff herein, whereby said defendant was to pay to plaintiff the same sum of money that took from the business for himself, an accounting has disclosed that there were some twenty-one items either in his favor personally or charged to expense wherein there were no invoices or supporting data on file in said Brewer's office to show that the same were actually paid or that they were legitimate expenses of the business or otherwise deductible from the earnings of the Agent. These amounted to the sum of \$925.89 and until and unless said defendant Brewer properly accounts for the same, they are charged against his account as unauthorized withdrawals;

(f) Under the special agreement hereinbefore alleged in Paragraph III (a) (iv) on page 7 hereof, the sum of \$1,619.37 is due, owing and unpaid from said defendant Brewer to Plaintiff;

The above liabilities making a total of \$8,356.34;

(g) There is to be credited to defendant Charles P. Brewer's account the following:

Accounts receivable not collected by defendant Charles P. Brewer, as specified in said contract, but collected by the plaintiff and credited to said defendant, \$1,297.25;

Inventory turned in by defendant Charles P. Brewer of \$540.71;

Turned in by defendant Charles P. Brewer on the original investment of plaintiff in the assets, \$1,465.71;

The above credits making a total of \$3,303.67, and leaving a balance of \$5,052.67 due under contractual obligation.

(2) Damage caused by said defendants to this plaintiff by virtue of their conduct, as hereinbefore described, includes the following:

(a) When said defendants started to usurp and take over all [15] of plaintiff's contracts, plaintiff sent men into said territory to interview and hold such accounts as plaintiff could, and the action of said defendants, as herein described, damaged plaintiff in the amount of said expense, consisting of \$3,596.95.

(b) There were unexpired contracts between plaintiff and its customers which were taken over and served by the defendants, which contracts were in writing and signed for a year but which, before their unexpired period had run, were cancelled by customers because defendants were serving them, and the sum of money lost by virtue of the cancellation of said contracts because of the action of said defendants, is the sum of \$2,481.50.

(c) There were other contracts between plaintiff and its customers which were in writing and the original term thereof had expired, but which written contracts provided that the terms of said written agreement with the cus-

tomers were to continue after the expiration of the original term "until cancelled in writing by either party," and said contracts were not cancelled in writing or otherwise until the defendants themselves, by their concerted action, usurped and took over the service covered in said written agreements, and the damage occasioned by defendants to plaintiff in taking over such service represented a sum of \$775.00.

(d) When said defendants, by their concerted action, took over the business of plaintiff in Oregon and other localities, men who were trained and valuable to the plaintiff's service in California and Washington were taken away from their respective localities and the business of this plaintiff and sent to Oregon for the purpose of serving plaintiff's business here, and in this process the plaintiff lost money which constitutes an item of damage occasioned by these defendants against this plaintiff and which item of damage, if it is ascertainable, should be included herein as a claim against said defendants, and unless the same is ascertainable (and at the present time plaintiff has no means of definitely ascertaining this amount), it is alleged that this [16] certain damage, but indefinite in amount, constitutes an additional grounds for injunction and equitable relief.

(e) That the defendants, and each of them, have been actively engaged since August 1, 1947, and prior thereto, in taking away the business

and accounts, either under contract or single shot, of plaintiff, in violation of their three-year non-competitive agreement, as herein described, and plaintiff alleges that this damage has amounted to approximately the sum of \$1,500.00 per month, or a damage of a total amount of \$4,500.00 to the present date and continuing, and increasing as long as defendants are permitted to operate under said conspiracy.

VII.

(a) Plaintiff has either performed and there has occurred all conditions precedent to the bringing of this suit or defendants' conduct has made the same impossible or unnecessary.

(b) Plaintiff has set forth herein the names and activities of all parties known to it as participating in the conspiracy, and alleges that it is informed and believes that there are others connected with said defendants in this conspiracy, but whose names and addresses are not known at this time to this plaintiff.

VIII.

In addition to the sums of money due and the damages occasioned to plaintiff by defendants jointly and severally as above described, said defendants have jointly and severally caused damage to plaintiff which is difficult and impossible of ascertainment because of the nature of defendants' actions, and has caused plaintiff to expend large sums of money in the protection of its rights, and unless

restrained by action of this Court, said defendants will jointly and severally continue in said course of conduct and create further irreparable cost and damage to plaintiff; that plaintiff has no plain, adequate or speedy remedy at law, but only in this court of equity.

Wherefore, Plaintiff Prays a judgment of this Honorable Court as [17] follows:

(1) For a temporary restraining order, enjoining said defendants and all persons now unknown to plaintiff and similarly engaged with defendants, as herein described, and each of them, from continuing their unlawful and unconscionable conduct, all as above mentioned, and, upon final hearing of this cause on the merits, that said temporary restraining order be made a permanent injunction against defendants and each of them under penalty of contempt of court if defendants, or either of them, continue in said practice herein described or in conflict with their agreements;

(2) Against said defendants, and each of them, for such sums of money as the Court may find are due, under the above allegations, to plaintiff either under contract or in damages, and to pay over to plaintiff all the gains, profits and advantages derived by defendants, or either of them, from their unlawful conduct, as herein described, or such sum of damages as the Court finds proper;

(3) Requiring defendants to specifically perform said agreement in delivering up to this plaintiff all merchandise, stock, chemicals, equipment, formulas

and secret trade information used exclusively in the above described business of plaintiff and acquired at great expense by plaintiff and protected by contract from falling into the hands of unscrupulous and unlawful competitors, and that the same be impounded in court during the pendency of this action;

(4) For plaintiff's costs herein; and

(5) Such other, further or different relief as to this Honorable Court may seem just and equitable in the premises;

(6) Plaintiff demands of defendants, and each of them, that within fifteen (15) days from the service hereof, each of said defendants make the following answers separately and fully, in writing and under oath, for the purposes of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

(a) That each of the following documents pleaded in this [18] Complaint are genuine:

(i) the contract or franchise of July 1, 1946, between plaintiff and defendant Charles P. Brewer, hereto attached as "Exhibit 1";

(ii) the agreement between plaintiff and employees, as described in Paragraph III (b) on page 8 hereof;

(iii) the letter of resignation, as described in Paragraph V on page 11 hereof.

(b) That each of the following statements are true:

(i) That defendants are jointly and severally
(1) soliciting or (2) serving customers or

patrons for pest control service who were formerly (1) under contract with plaintiff for similar service or (2) who were served by plaintiff for pest control.

(ii) That upon service of customers by the defendants, or either of them, the defendants used the following notice:

“Patrons

This establishment inspected and serviced
each month for disease carrying pests

By

Brewer's Pest Control

State-Wide

4929 N. E. 28th Avenue, Portland 11, Oregon

1947

WEBster 8082”

(c) Submit a list of all patrons and customers and their addresses served by defendants, or either of them, and whom they are now serving or have served since August 1, 1947, in the matter of pest control.

Dated at Portland, Oregon, this 22nd day of October, 1947.

KENNETH C. GILLIS,

F. LEO SMITH,

ROBERT R. RANKIN,

Attorneys for Plaintiff.

[Endorsed]: Filed October 24, 1947. [19]

EXHIBIT No. 1

SALES AGENT'S AGREEMENT WITH PARAMOUNT PEST CONTROL SERVICE

This Agreement executed in duplicate at Oakland, California, this 1st day of July, 1946, by the Paramount Pest Control Service, a corporation, hereinafter called the Company, and Charles P. Brewer of Portland, Oregon, hereinafter called the Agent,

Witnesseth:

1. The Company hereby grants to the Agent, and the Agent does hereby accept the sole and exclusive franchise to represent the Company in rendering services for and selling and using the products of the Company in that certain territory described as follows, to wit: The entire State of Oregon. Any deviation shall be in writing with Franchise holders of adjoining states, a copy of which must be sent to Company.

It is understood and agreed that this franchise only covers such services and products as can be rendered, used and sold by Agent under a Group "E" Owners and Operators License issued by the State of California, and that nothing herein contained shall prevent Company from rendering, using and selling services and products of the Company in said territory which are not covered by said Group "E" Owners and Operators License, or which cannot be rendered, used or sold by Agent by reason of the limitations of said License.

It is agreed, however, that if and when Agent secures a License to render services for and to use and sell products of the Company in addition to those covered by Group "E" Owners and Operators License, that Agent shall then have the right to [20] and he is hereby granted the Exclusive Franchise under the terms and conditions of this contract for such additional services and products.

2. This Agreement shall become effective on the 1st day of July, 1946, and shall, unless sooner terminated as herein provided, continue in full force and effect for a period of ten (10) years from said date. Said agreement may be cancelled by either party at any time on ninety days' written notice to the other. At the end of said period of ten (10) years provided for herein, in the event that all of the terms and conditions of this agreement have been kept and performed, said agreement shall thereby be automatically renewed for the same period of years as originally granted for, and thereafter shall continue for successive like periods unless cancelled, as provided herein.

3. The Agent shall devote the whole of his time, attention and energies to the performance of such duties as may from time to time be assigned to him by the Company, and shall not either directly or indirectly, alone, or in partnership, be connected with or concerned in any other business or employment whatsoever during the said term of his employment, and shall serve the Company faithfully, diligently and according to his best abilities in all respects, and use his utmost endeavors to promote the interests of the Company.

4. All contracts for work and services to be rendered by Agent to customers shall be taken in the name of the Company, the original of said contract shall, upon its execution, be forwarded to the Company, the Agent retaining a Copy and the Customer being [21] furnished a copy.

5. Agent agrees to pay Company in the manner hereinafter provided for such Franchise twenty (20%) per cent of the gross business done by Agent. As compensation for his services, Agent shall retain all gross profits over said twenty per cent (20%) above mentioned.

6. From his compensation, Agent agrees to pay the following expenses of maintaining said business in said territory, namely:

- a. Wages Service
- b. Materials & Expense Service
- c. Wages Salesmen
- d. Commissions
- e. Advertising
- f. Auto Expense—Gas, Oil & Repairs
- g. Depreciation
- h. Insurance
- i. Taxes & Licenses
- j. Traveling Expense
- k. Wages Office
- l. Bad Debts
- m. Donations
- n. Gas Light & Water
- o. Legal & Accounting
- p. Miscellaneous Expense

- q. Office Expense—Stationery, Printing & Supplies
- r. Telephone & Telegraph
- s. Discounts & Allowance—Received
- t. Profit & Loss on Sales of Capital Assets
- u. Tithing
- v. Discounts & Allowance—Paid
- w. Interest Paid

together with such other expense as in the judgment of the Company should be charged against said business.

7. Company agrees that from the amount due the Company under paragraph 5, there shall be deducted an amount equal to ten per cent (10%) thereof, which shall be paid to the Christian Service Foundation, a non-profit charitable organization. Agent agrees that from the monthly net profit of said business shall be deducted an amount equal to ten per cent (10%) of said net profit, [22] which shall be paid to said Christian Service Foundation.

8. Agent shall open a bank account in the name of the Company and shall deposit therein all moneys received by him in connection with said business. Moneys shall be drawn out of said account only upon the signature of Agent and some employee of Agent, to be designated by Agent.

9. Agent shall keep books of account showing all transactions in said business. Said books shall be opened by Company Auditor and shall then be maintained to conform with the systems used by Company and as directed by said Auditor. Agent agrees

that all times the representatives of the Company shall have free access to the offices of Agent and to all books, records, materials and documents used by said Agent in connection with the business covered by this contract.

10. The Company Auditor shall audit the books of Agent immediately after the last day of each and every month during the life of this contract, and prepare a statement of the business done during the previous month by Agent, together with a profit and loss statement for said previous month. Upon the completion of said statement and presentation of a copy thereof to Agent, said Agent agrees to forthwith deliver to said Auditor a check payable to Company for the amount due Company under said statement, less ten per cent (10%) thereof; a check payable to Christian Service Foundation for the ten per cent (10%) of the amount due Company under said statement, and a check payable to Christian Service Foundation for an amount equal to ten per cent (10%) of agent's net profits, as shown by said statements. Said checks, in any event, must be delivered on or before the 10th day of the month in which they are due. It is agreed by both parties that the decision of the Auditor as to the correctness of said statement and of all items listed thereon shall be final and conclusive as [23] to both parties.

11. Agent shall be allowed deductions from gross business acquired in any one month as shown by his books for cancellations of any business, and allowance slips duly allowed. These deductions shall be

made from the gross business of the next succeeding month after the month when such cancellations or allowance slips occur.

Agent shall stand all loss for failure to make collections.

12. The Agent shall maintain an office in his territory and shall cause the name of the Company, as well as his own, to be properly listed in the local telephone directory in the classified section thereof, and shall display upon the windows of any office the name of the Company as well as his own name, as Agent. At the time of signing of this agreement, the Company agrees to furnish him with such trucks and equipment as in its judgment is necessary for his use. Thereafter Agent agrees to purchase on his own account such additional trucks and equipment as shall be necessary to handle his said business.

13. Upon the signing of this contract, Agent agrees to purchase from Company such stock, merchandise, chemicals and materials as will provide him with such quantity of each as will meet the needs of his business for the next succeeding thirty days and that he will continue to maintain such quantities of each as will meet the needs of his business for a thirty day period. Notice of his intention to purchase any of the above must be given at least thirty days in advance of the delivery date.

14. The Agent agrees to use every effort in the promotion and sale of the products and services of the Company in the above territory and do what ever shall be necessary or required by the Company to increase the business of said Company in said territory.

15. Each of the parties hereto shall be excused from the performance of the terms and conditions herein contained, and this agreement and all the terms and conditions herein contained are subject to such interference, interruption or cessation as may be caused by acts of God, strikes, lock-outs, floods, boycotts, picketing, acts of the public enemy, governmental priority regulations, laws, regulations or executive orders of the Government of the United States, or any other cause or condition over which the party has no control.

16. The Company agrees to furnish the Agent all advertising matter, contract forms, letterheads and any other printed matter which, in the opinion of the Company, is necessary in the operation of the business of the Agent, and which Agent agrees to pay for. All advertising, window displays and listings shall conform to the methods as given to him by the Company.

17. It is expressly understood and agreed by the Agent that all of the rules and regulations of the Company which are now printed and in full force and effect, or any amendments that may be made hereafter, or any subsequent rules and regulations made by the Company, shall be and they are hereby declared a part of this contract and binding upon the Agent, and the Company agrees to furnish the Agent with a copy of any rules and regulations now in force, and to immediately furnish him with any amendments or new rules and regulations that may be hereafter adopted. [25]

18. The Agent agrees to at all times keep intact all of the Communications and other material given to him by the Company as confidential information, and that in the event of the termination of this agreement he will surrender all of the same to the Company or its designated agent, and will not at or subsequent to the termination of this agreement divulge such confidential information to anyone outside of the organization.

19. Any notice to be given under the terms of this agreement by the Company to the Agent may be given by placing the same in a sealed envelope addressed to the Agent at, and said sealed envelope containing the notice so addressed, with postage thereon prepaid, shall be deposited in the United States Post Office at Oakland, California or any other place. In the event that the principal place of business of the Agent may be changed, and the Company is notified of said fact prior to the mailing of any notice under this agreement, then said notice shall be sent to the address where the principal place of business is then located. Upon such deposit being made, as aforesaid, the notice shall, for all purposes of this agreement, be complete.

20. In the event of the termination of this agreement, Agent promises and agrees to surrender and deliver to the Company, upon demand, possession of the office, all of the records, cards, information, stock, merchandise, chemicals, equipment and any and all instrumentalities connected with and used in his said business. Said demand may be made at

any time after notice of termination is received or served.

21. Should Agent own the real property and building in which his said office is located at the time of the termination of this agreement for any cause, then said Agent agrees to and does [26] hereby grant Company the right and option, for a period of ninety days after the termination of this contract, to purchase said property at the fair market value thereof.

22. In the event of the termination of this agreement the Company agrees to pay Agent, or his legal representatives, the cost of all stock, merchandise, chemicals and equipment owned by Agent and used in connection with said business, less any depreciation on same that appears on the books.

23. Neither this agreement nor any interest therein shall be assignable at the hands of said Agent, except as hereinafter provided, and in the event any assignment is made by the Agent for the benefit of creditors, or if said Agent be adjudged a bankrupt, whether voluntary or involuntary, or if a receiver be appointed in any proceedings against the Agent, this agreement and all the rights of the Agent thereunder shall immediately terminate.

24. Agent agrees to cover his employees and property with all necessary fire, theft, liability and compensation insurance with proper policies, to be approved by Company, and further agrees to take out such other insurance as Company shall deem necessary, all to be paid for by Agent, and which shall be included as an expense against his said business.

25. The Agent agrees that he will not at any time during the life of this agreement mortgage, hypothecate, pledge or seek to encumber any merchandise, personal property or equipment in his possession consigned to him by the Company.

26. Agent agrees that he will at all times conduct his business in accordance with and conform to all municipal, county, state and federal statutes, laws, ordinances, regulations and executive orders. [27]

27. It is agreed that the laws of the State of California shall govern any and all questions that at any time may arise concerning the validity, construction or interpretation of this agreement, or any provision thereof, and the parties hereto agree that should any civil action be filed upon this agreement, or for any violation thereof, that the same shall be filed in the Superior Court of the State of California, in and for the County of Alameda, which said Court is hereby given exclusive jurisdiction of any such action. Time is expressly agreed to be of the essence thereof.

28. A waiver by the Company of any branch or any term or condition of this agreement shall not be construed in any way as a waiver of a further, like, or other breach of this agreement.

29. The Company reserves the right to interview and be satisfied with and approve all persons employed by the Agent in his territory, and the Agent agrees that he will not employ any person without first securing the approval of said Company. Agent agrees to discharge any person employed unsatisfactory to Company, on demand.

30. The Agent agrees to be responsible for all accounts served in his territory, for the collection of all accounts in his territory, and for all men working for and under him in said territory.

31. The Agent further agrees that for a period of three years after the termination of this agreement, or his period of employment, he will not, directly, or indirectly, communicate or divulge to or make use of for the benefit of any person, partnership or corporation any of the trade secrets, formulas, processing methods of the Company, or the names, addresses or requirements of any of the customers of the Company, or any other information related [28] to the Company's business which he may have acquired or learned during his employment. The Agent further agrees that he will not, either as an employee, employer or otherwise, canvass, solicit or cater to any of the customers of the Company, which he may know of because of his employment by said Company.

32. The Agent further agrees that all trade secrets, formulas, methods, processes and the like, and all customers' lists, operation data, discovered, acquired or prepared during his employment, and connected with the business of the Company shall be the sole property of the Company.

33. The Agent further agrees that he will submit the necessary information for obtaining a surety bond in such proportion as the Company may require, and furnish said bond upon demand of the Company. The Company agrees to pay the premium on said bond.

34. Should the Agent die during the life of this agreement and leave a will designating a person whom he desires to have carry on the services provided for in this contract, and providing any condition or limitation upon same in said will, the Company agrees that it will enter into a contract similar in form and effect to the within contract with such person, and changed only by the conditions or limitations provided in said will, providing the new man is satisfactory to the Company.

35. The Company shall be the exclusive judge of whether the Agent is complying with all the terms and conditions of this agreement, and its decision in this matter shall be final and conclusive as to that fact.

36. This agreement shall be binding upon the heirs, executors, administrators and assigns of the parties hereto. [29]

In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

PARAMOUNT PEST
CONTROL SERVICE,
a Corporation,

By /s/ G. H. FISHER.

/s/ CHARLES P. BREWER,
Agent. [30]

[Title of District Court and Cause.]

MOTION FOR RESTRAINING ORDER

Comes Now the plaintiff above named, appearing by its attorneys, Kenneth C. Gillis, F. Leo Smith and Robert R. Rankin, and move the above-entitled court for an order restraining said defendants from a continued operation and practice, as more fully described in the Complaint herein; and

Moves that this Court issue an Order to Show Cause, fixing a time and place for hearing, why the defendants and each of them should not be so restrained.

This motion is based on

- (1) The verified Complaint filed herein and reference to which is hereby made;
- (2) The affidavit of T. C. Sibert, President of the plaintiff corporation, and attached to this Motion;
- (3) The Rules of Civil Procedure for the District Courts of the United States; and
- (4) On statutes and authorities in interpretation thereof.

Dated at Portland, Oregon, this 22nd day of October, 1947.

KENNETH C. GILLIS,
F. LEO SMITH,
ROBERT R. RANKIN,
Attorneys for Plaintiff.

[Endorsed]: Filed October 24, 1947. [31]

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR
RESTRAINING ORDER

State of California,
County of Alameda—ss.

I, T. C. Sibert, being first duly sworn, depose and say:

That I am the President of the plaintiff corporation; that I have read and verified the Complaint herein; that I know its contents and the allegations therein contained, and that the same are all true as I verily believe;

That the defendants, in the manner in said Complaint described, are doing substantial damage to the plaintiff, and three of them were under contract to refrain from doing the very things they are doing, and the other two defendants have knowledge. I verily believe, of all that has transpired and yet continue to aid and abet the other defendants in the conspiracy alleged, and do so for their joint and several enrichment and the acquiring of plaintiff's business, as more fully detailed and set forth in said complaint; that knowing the character of the defendants involved and their program and their past practice, I firmly believe that they will continue in this course of conduct to the plaintiff company's irreparable damage unless they are restrained by this court; that a temporary restraining order is requested for the purpose of protecting this busi-

ness, to last until the hearing of this case upon the merits.

Further, deponent sayeth not.

/s/ T. C. SIBERT.

Subscribed and sworn to before me this 22nd day of October, 1947.

[Seal] /s/ KENNETH C. GILLIS,
Notary Public in and for the County of Alameda,
State of California.

My Commission expires December 8, 1950.

[Endorsed]: Filed October 24, 1947. [32]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon reading plaintiff's verified complaint filed herein and its motion for a temporary restraining order pendente lite, together with the affidavit attached to said motion, and the Court being satisfied that there is reason for the issuance of this Order to Show Cause herein;

It is now hereby Ordered that defendants, and each of them, above named appear before this Court at its courtroom in the United States Court House at Main Street, between Sixth Avenue and Broadway, in the City of Portland, County of Multnomah, State of Oregon, on Monday, the 17th day of No-

vember, 1947, at the hour of 10 o'clock a.m. of that date, to then and there show cause, if any they have, why a preliminary injunction should not be issued in favor of the plaintiff and against the defendants, and each of them, pending the hearing of this suit on the merits, which order shall enjoin and restrain said defendants, and each of them, during the pendency of this action, together with any members of their association, their agents, officers, representatives and employees, from directly or indirectly doing the matters and things as alleged in said complaint, a copy of which is served concurrently herewith, and particularly from soliciting and serving customers of plaintiff, persuading or inducing customers to break their contracts of service with the plaintiff, and from interfering with the business of plaintiff as established in Oregon, as in said complaint described, prior to August 1, 1947, or from violating their agreements, or aiding or abetting in the violation of those agreements, to refrain from competition for a period of three (3) [33] years after the cessation of employment, and, further, from the use of any of plaintiff's methods, equipment or products, or the information gleaned from their previous service with plaintiff in the service of defendants' customers; and

It is further Ordered that a copy of this Order to Show Cause be served by the United States Marshal upon said defendants at the time of the service of the complaint herein, and that said copy of this

Order be certified to by one of the attorneys of record herein.

Done in open court at Portland, Oregon, this 24th day of October, 1947.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed October 24, 1947. [34]

[Title of District Court and Cause.]

ANSWER OF CHARLES P. BREWER TO
INTERROGATORIES

State of Oregon,
County of Multnomah—ss.

I, Charles P. Brewer, being first duly sworn, make the following answers to the interrogatories propounded in the above case:

Answer to Interrogatory (a)

(I) The contract of July 1, 1946, attached as Exhibit 1, is genuine but the contract was modified after the date thereof so as to provide that the net profits would be divided between the company and the agent on an equal basis.

(II) I know of no such agreement between the plaintiff and any of the defendants. I believe the defendant Raymond Rightmire signed such an

agreement with a partnership between T. C. Sibert and G. H. Fisher, doing business as Paramount Pest Control Service. The certificate of partnership was filed on March 1, 1945 in Book 41, Page 293 of the Assumed Name Business Certificates of Multnomah County, Oregon.

(III) The letter of resignation is genuine.

Answer to Interrogatory (b)

(I) I am serving customers or patrons for pest control service who were formerly served by plaintiff for pest control and some of whom were under contract with plaintiff for [35] similar service. The other defendants are employed by me and as such employees serve customers or patrons for pest control service who were served by the plaintiff for pest control and some of whom were under contract with plaintiff for similar service. The balance of the statement is untrue.

(II) The statement is true.

Answer to Interrogatory (c)

A list of the customers and patrons is annexed to this answer and marked Exhibit A.

/s/ CHARLES P. BREWER.

EXHIBIT A

Fischer Flouring Mills.....	Portland
Pacific Coast Fruit Co.....	"
Oregon Flower Growers, Ass'n.....	"
Sunshine Biscuit Co.....	"
Sav-On-Drug Co.	"
Hi-Spot Cafe.....	Camas, Wn.
Home Town Bakery.....	" "
Crown Willamette Inn.....	" "
Albers Milling Co.....	Portland
Hawthorne Food Mkt.....	"
Lairds Red & White.....	"
Dizzy Whiz Cafe	"
Hudson Duncan Cafe	" & Branches
39th. & Division Cafe	"
Rowes Coffee Shop.....	"
Flynns Fine Food	"
Sellings Red & White	Gresham
Hickman Pharmacy.....	Vancouver, Wn.
Plaza Theatre	Portland
Ideal Dairy	Portland
Nite & Day Mkt.....	Vancouver, Wn.
Columbia Food Stores.....	Portland & Branches
Zimmerman Feed.....	Yamhill, Ore.
Cozy Cafe	Newberg
Pacific Meat Co.	Portland
Imlay & Sons	Aloha
Imlay Feed & Seed.....	Reedville
Perfection Bakery	Hillsboro
West Lynn Grocery.....	West Lynn, Ore.
Harolds Grocery.....	Portland
Harvest Milling Co.....	"
Grand Ave. Cafe	"
Dairy Co-op.....	"
Lews Mkt.....	Oregon City
Safeway Stores, Inc.	Portland & Branches
Swartz Transfer.....	Portland
Portland Provisioner.....	"
Transportation Club	"
Smith Grocery	Hillsboro
Whistlin' Pig Cafe.....	Portland

Rivieria Cafe.....	Newberg
Standard Market	Oregon City
Harold & Dans Cafe.....	Portland
House of Good Shepherd	Portland
Brookside Grocery.....	Vancouver, Wn.
Ralphs Cafe.....	Cascade Locks
Sunset Cafe.....	Hood River
Browns Farm Store.....	Vancouver, Wn.
Eds Feed & Seed	Hood River
Foodland Grocery	Vancouver, Wn.
Little Onion Cafe.....	Hood River
Hood River Cafe	"
9th. St. Super Mkt.....	The Dalles
Cascade Baking Co.....	" "
Kerr Gifford & Co.....	" "
McHales Grocery	" "
Hotel Dalles Coffee Shop.....	" "
Star Theatre.....	Goldendale, Wn.
Grows Market.....	" "
Reliance Creamery.....	" "
Adams Market	Arlington
Central Mkt.....	Heppner, Ore.
Heppner Cafe.....	"
Red & White Store.....	"
Elkhorn Cafe	"
Aikens Tavern	"
Heppner Laundry	"
Yarnell Tavern.....	Lexington
Lexington Cafe.....	"
Farm Bureau Co-op.....	Hermiston
Purity Bakery	Pendleton
Pendleton Baking.....	"
Pacific Fruit & Produce.....	La Grande
Inland Poultry & Feed.....	"
Stein Club.....	"
Portland Cafe.....	"
7 up Bottling Co.....	"
The Stockman.....	"
Stein Coffee Shop.....	"
Sacajuca Coffee Shop.....	"
Royal Cafe.....	"
McCord Grocery.....	"

Union Bakery.....	Union, Oregon
Pacific Fruit & Produce.....	Baker, Oregon
C. C. Anderson.....	"
The Provisioner.....	"
Stockmans Exchange.....	"
Stanfords Store.....	Weiser, Idaho
Washington Hotel.....	"
Idaho Candy.....	Boise, Idaho
Geiser Grand Hotel.....	Baker, Oregon
Harney Valley Bakery.....	Burns
Hudson Duncan Co.....	Bend, Oregon
Todds Bakery.....	The Dalles
Farmers Market.....	" "
Sigmans Food Stores.....	Hermiston
Jacksons Food Market.....	Baker, Oregon
Killgores Dairy.....	Redmond
Bond St. Food Market.....	Bend
Central Ore. Co-op. Creamery.....	Redmond
American Bakery.....	Nampa, Idaho
Electric Bakery.....	"
Hound Pup Cafe.....	Cascade Locks
The Dalles Meat Market.....	The Dalles
Lauderback Market.....	White Salmon, Wn.
Pinky's Union St. Market.....	The Dalles
Bill Rivers.....	La Grande
Baker-LaGrande Groc. Co.....	"
Elks Club.....	Baker
Valley Dairy.....	"
St. Charles Hospital.....	Bend
Nampa Whse. Grocery.....	Nampa, Idaho
City Market.....	Burns, Oregon
Goldendale City Dump.....	Goldendale, Wn.
Gem State Bakery.....	Payette, Idaho
Campas Market.....	Corvallis
Miles McKay.....	Marcola, Oregon

Griggs Market.....	Klamath Falls
Cottage Bakery.....	Cottage Grove, Oregon
Cecil's Cafe.....	“ “
Burlingham-Meeker	Amity, Oregon
Tillamook-Amity Co-op.	“
Smith Baking Co.....	Salem
Pacific Fruit & Produce.....	Albany
Kelleys Feed.....	“
Smoke House.....	Glendale
Albany Feed & Seed.....	Albany
Albany Laundry.....	“
Glendale Hotel	Glendale
Burlingham-Meeker	Rickreal
Burlingham-Meeker R.F.D.	Amity
Glendale Club	Glendale
Pacific Fruit & Produce.....	Corvallis
Burlingham-Meeker	Shedd
Creech Thrift Store.....	Glendale
Henningers Market	Roseburg
Howard Jones Feed.....	Hubbard
F. W. Woolworth.....	Medford
Pacific Fruit & Produce.....	“
Aurora Whse. Inc.....	Aurora
Woodburn Feed & Seed.....	Woodburn
Barkus Feed Mill.....	Salem

State of Oregon,
County of Multnomah—ss.

I, Charles P. Brewer, being first duly sworn, depose and say that I have read over the above and foregoing answers to the interrogatories and know the contents thereof and that the answers made by me are true except that where any answers are made upon information or belief the same are true according to my best knowledge, information and belief.

/s/ CHARLES P. BREWER.

Subscribed and sworn to before me this 14th day of November, 1947.

[Seal]

E. F. BERNARD,

Notary Public for Oregon.

My Commission Expires 1/12/1941.

Service of the foregoing Answer of Charles P. Brewer to Interrogatories is hereby accepted this 14th day of November, 1947.

/s ROBERT R. RANKIN,

Of attorneys for Plaintiff.

[Endorsed]: Filed November 15, 1947. [40]

[Title of District Court and Cause.]

ANSWER OF ROSALIE BREWER
TO INTERROGATORIES

State of Oregon,
County of Multnomah—ss.

I, Rosalie Brewer, being first duly sworn, make the following answers to the interrogatories propounded in the above case:

Answer to Interrogatory (a)

(I) The contract of July 1, 1948, attached as Exhibit 1 is genuine, but the contract was modified after that date to provide that the net profits would be divided on an equal basis.

(II) I never signed such an agreement, although I am informed that Ray Rightmire signed such an agreement with a partnership.

(III) The letter of resignation is genuine.

Answer to Interrogatory (b)

(I) I am not soliciting or serving customers or patrons for pest control service who were formerly under contract with plaintiff for similar service or who were served by plaintiff for pest control. I have no knowledge as to what the other defendants are doing.

(II) The statement is true.

Answer to Interrogatory (c)

(I) I have not served any customers, but I have seen [41] Exhibit A attached to the answers of Charles B. Brewer and I believe the list to be correct.

/s/ ROSALIE BREWER. [42]

State of Oregon,
County of Multnomah—ss.

I, Rosalie Brewer, being first duly sworn, depose and say that I have read over the above and foregoing answers to the interrogatories and know the contents thereof and that the answers made by me are true except that where any answers are made upon information or belief the same are true according to my best knowledge, information and belief.

/s/ ROSALIE BREWER.

Subscribed and sworn to before me this 14th day of November, 1947.

[Seal] /s/ E. F. BERNARD,

Notary Public for Oregon.

My Commission Expires: 1/12/1951.

Service of the foregoing Answer of Rosalie Brewer to Interrogatories is hereby accepted this 14 day of November, 1947.

/s/ ROBERT R. RANKIN,

Of Attorneys for Plaintiff.

[Endorsed]: Filed November 15, 1947. [43]

[Title of District Court and Cause.]

ANSWER OF EARL MERRIOTT
TO INTERROGATORIES

State of Oregon,
County of Multnomah—ss.

I, Earl Merriott, being first duly sworn, make the following answers to the interrogatories propounded in the above case:

Answer to Interrogatory (a)

(I) I never saw the contract of July 1, 1946, attached as Exhibit 1 before I read it in the complaint that was served on me in the case filed in the Circuit Court of Multnomah County, Oregon. I understand Mr. Brewer says the Exhibit 1 is a copy of the original and I have no reason to dispute that fact.

(II) I never saw any such agreement and never signed any.

(III) I never saw the letter of resignation and am not able to say whether the letter is genuine.

Answer to Interrogatory (b)

(I) I am employed by Charles P. Brewer and as such serve customers or patrons for pest control service who were formerly served by plaintiff for pest control. I formerly solicited customers who were served by plaintiff for pest control but have not done so since the 1st day of November, 1947.

(II) The answer to the statement is true.

Answer to Interrogatory (c)

I have no list of the patrons and customers served but I have checked over Exhibit A attached to the answers of Charles P. Brewer and I believe the list to be correct.

/s/ EARL MERRIOTT. [45]

State of Oregon,
County of Multnomah—ss.

I, Earl Merriott, being first duly sworn, depose and say that I have read over the above and foregoing answers to the interrogatories and know the contents thereof and that the answers made by me are true except that where any answers are made upon information or belief the same are true according to my best knowledge, information and belief:

/s/ EARL MERRIOTT.

Subscribed and sworn to before me this 14th day of November, 1947.

[Seal]

E. F. BERNARD,

Notary Public for Oregon.

My Commission Expires: 1/12/1951.

Service of the foregoing Answer of Earl Merriott to Interrogatories is hereby accepted this 14th day of November, 1947.

/s/ ROBERT R. RANKIN,

Of attorneys for Plaintiff.

[Endorsed]: Filed November 15, 1947. [46]

[Title of District Court and Cause.]

ANSWER OF RAYMOND RIGHTMIRE TO
INTERROGATORIES

State of Oregon,
County of Multnomah—ss.

I, Raymond Rightmire, being first duly sworn, make the following answers to the interrogatories propounded in the above case:

Answer to Interrogatory (a)

(I) I never saw the contract of July 1, 1946 attached as Exhibit I before I read it in the compliant that was served on me in the case filed in the Circuit Court of Multnomah County, Oregon. I understand Mr. Brewer says the Exhibit 1 is a copy of the original and I have no reason to dispute that fact.

(II) I at one time signed such an agreement but not with the plaintiff. At the time I signed the agreement I was employed by a partnership.

(III) I never saw the letter of resignation and am not able to say whether the letter is genuine.

Answer to Interrogatory (b)

(I) I am employed by Charles P. Brewer and as such serve customers or patrons for pest control service who were formerly served by plaintiff for pest control. I formerly solicited customers who were served by plaintiff for pest control but have not done so since the 1st day of November, 1947.

(II) The answer to the statement is true.

Answer to Interrogatory (c)

I have no list of the patrons and customers served but I have checked over Exhibit A attached to the answers of Charles P. Brewer and I believe the list to be correct.

/s/ RAYMOND RIGHTMIRE.

State of Oregon,
County of Multnomah—ss.

I, Raymond Rightmire, being first duly sworn, depose and say that I have read over the above and forgoing answers to the interrogatories and know the contents thereof and that the answers made by me are true except that where any answers are made upon information or belief the same are true according to my best knowledge, information and belief.

/s/ RAYMOND RIGHTMIRE.

Subscribed and sworn to before me this 14th day of November, 1947.

[Seal] E. F. BERNARD.

Notary Public for Oregon.

My Commission Expires 1-12-1951.

Service of the foregoing Answer of Raymond Rightmire to Interrogatories is hereby accepted this 14th day of November, 1947.

/s/ ROBERT R. RANKIN,

Of Attorneys for Plaintiff.

[Endorsed]: Filed November 15, 1947. [49]

[Title of District Court and Cause.]

AFFIDAVIT IN RESPONSE TO ORDER TO
SHOW CAUSE

State of Oregon,
County of Multnomah—ss.

I, Charles P. Brewer, being first duly sworn, depose and say:

I am one of the defendants in the above entitled action and make this affidavit in response to the order to show cause issued in the action as to why a preliminary injunction should not be issued in favor of the plaintiff and against the defendant.

I formerly resided in Oakland, California, and about March 1, 1946, I was employed by a partnership doing business under the name of Paramount Pest Control Service. The partners were T. C. Sibert and G. W. Fisher, and this was the same partnership which filed an assumed name business certificate on March 1, 1945, in Book 41, Page 293, of the assumed name business certificates, of Multnomah County, Oregon. My duties with the partnership were to solicit customers and service their places of business. I was at no time furnished with any formulas, processes or secrets. The partner bought poison from wholesalers which could be bought on the market by any person or business concern. I was paid a salary of \$200.00 a month by the partnership.

In April, 1946, I was sent by the partnership to take charge of the business in the state of Oregon

and was promised a salary of \$250.00 per month and expenses. I stopped at the [50] Roosevelt Hotel in Portland. H. W. Hilts, on behalf of the partnership, brought a quantity of poison and extermination supplies to my room in the Roosevelt Hotel and left them there and immediately returned to California. No place of business was furnished me and inasmuch as a guest in a hotel could only remain for six days at that time, it was necessary for me to move the business and exterminator's supplies from hotel to hotel with me. I had been promised permanent employment on a salary by the partnership and relying on such representations, I sold my home in Oakland, California, and bought a home in Portland, Oregon.

About July 1, I was informed that a corporation was about to be formed in California, that the business in Oregon was in the red, and it was necessary that "it be dumped," and that I would have to sign a contract with the corporation or my employment would be at an end. Accordingly, I signed the instrument of which Exhibit 1 attached to the plaintiff's complaint is a copy. It will be noted that the instrument does not bear the official designation of G. H. Fisher, who signed on behalf of the corporation, and it is my information that at the time the instrument was signed, the corporation had not been organized. The corporation never qualified to do business in the state of Oregon until sometime in August, 1947.

After the signing of the instrument, I devoted my best energies to building up a business but by Nov-

ember 1, I found that there could be no profit to me under the terms of the agreement. Accordingly, I drove with my wife to California and consulted with Mr. Sibert. I told him that it would be necessary for me to quit the business and he said that he wished me to stay, and he, at that time, agreed to a modification of the contract so that I would receive fifty per cent of the net profits. I returned to Portland, and because of the modification agreed upon and not otherwise, continued in my [51] efforts to build up the business.

About March 1, Mr. Hilts delivered to me a statement or purported statement of my account with the company from January 1, 1947, which was cast not on the basis that I was to receive fifty per cent of the net profits, but on the percentages set up in the written contract. I immediately told Mr. Hilts that if the agreement was not to be lived up to, I was through and he left for California, and on his return wrote me a letter saying that I was right about the modification and that I was to receive fifty per cent of the net profits.

In June, 1947, Mr. Hilts came to Portland, and asked me to borrow money to pay to the company. I told him that I could not do so and shortly Mr. Sibert called me from Seattle about borrowing money to pay to the company and I told him the same thing. Mr. Sibert and Mr. Hilts both then came to Portland and went with me to the Bank of California. They explained to Mr. Ridehalch and told Mr. Ridehalch that I was the entire owner of the business in Portland and of all the supplies,

equipment and so forth, and that the only interest they had was in some furniture, and that I was entitled to borrow on the strength of a financial statement showing me the owner. I refused to borrow any money because Mr. Sibert had told me that he would never press me for money until the business in Oregon was on a paying basis. They then told me that beginning July 1, I would have to do business on the basis of the old written agreement and not on the basis of an equal division of the net earnings. I told them that it would be impossible for me to proceed on that basis, and I sent in my letter of resignation because of the violation and breach by the plaintiff of their agreement with me as modified.

I have repeatedly requested that I be furnished an audit of my account based on an equal division of the net profits but I have never been furnished such an audit. The company [52] refused to furnish me the necessary equipment to carry on the business and it was necessary for me to purchase much of the equipment myself and out of my own funds.

I have no property in my possession belonging to the plaintiff. All property belonging to the plaintiff was in a warehouse located at 15th and N. W. Marshall Streets, Portland, Oregon, and in the office at 519 W. Park Street, Portland, Oregon. I told the warehouseman to deliver any of the property there to the plaintiff and the plaintiff has taken possession of the office equipment.

The plaintiff has in its possession equipment and supplies purchased by me and belonging to me to

the amount and value between \$1,500.00 and \$2,000.00.

After my resignation I went into the pest control business in Oregon as Sibert and Fisher had breached their agreement made with me when I was sent to Oregon and as a result of which agreement, I sold my home in California and bought one in Portland, Oregon, and after the corporation was formed, it was my understanding that this same Sibert became President of the corporation. I was putting my time, money and energy in an attempt to build the business in Oregon and when it suited the purpose of the corporation, they repudiated their agreement with me to divide the net profits on an equal basis.

I am serving many customers that were never serviced by the plaintiff and some of the customers who were formerly serviced by the plaintiff have sought my services as they were dissatisfied with the service rendered by the plaintiff. I did solicit some of the plaintiff's customers but have ceased doing so and do not intend to solicit their customers in the future.

Prior to August 1, 1947, the plaintiff was sending men as far as Boise, Idaho, to service customers. About [53] September 1, they abandoned this service and a number of the plaintiff's customers which I am servicing are in the district which the plaintiff abandoned.

It was definitely agreed between Mr. Sibert and me that the modification of the contract to the effect

that the net profits were to be divided equally between the plaintiff and me would not be for a limited period of time, but would continue for the duration of the contract.

[Seal] CHARLES P. BREWER.

Subscribed and sworn to before me this 15th day of November, 1947.

E. F. BERNARD,

Notary Public for Oregon.

My Commission Expires 1-12-1951.

Service accepted this 15th day of November, 1947.

ROBERT R. RANKIN,

Attorney for Plaintiff

[Endorsed] Filed November 15, 1947. [54]

[Title of District Court and Cause.]

AFFIDAVIT COUNTER TO
CHARLES P. BREWER'S AFFIDAVIT

State of Oregon,

County of Multnomah—ss.

I, DeGray S. Brooks, being first duly sworn, depose and say:

That I am manager of Paramount Pest Control Service, a corporation, located at Portland, Oregon, and have been such since the 15th day of August, 1947, and consequently I am familiar with the customers who have cancelled their service with the plaintiff and with the accounts previously on its books.

That I have read the answers of Charles P. Brewer to the interrogatories herein and have analyzed the list of accounts which he has submitted, as they appear on the books of the plaintiff, and from his own statement I advise the Court that he lists some one hundred and forty-two accounts.

But under his listing he makes such generalization as Safeway Stores, Inc., whereas this includes three warehouses and fifty-one stores which are not detailed in his listing, but which, through his association with the head of that department, he now serves in their entirety. He serves Hudson-Duncan, listed as three stores, whereas there are six, and Columbia Food Stores, listed as one, whereas there are nine stores served by him; so his actual acquisition of the business of Paramount is much greater than shown on his listing.

To analyze further his statement, it appears he has taken one hundred and sixty-five accounts from Paramount Pest Control Service, leaving some forty of which we have no records. This does not necessarily mean that Paramount did not have these accounts before, because I personally instructed Charles P. Brewer to look after [55] Sigman's Food Stores. The Sigman Food Stores were under the plaintiff's service in Washington and I wrote Mr. Brewer to take care of them in Oregon several times and heard nothing further from him, but they now appear on his list attached to his Answer as stores he serviced and which should have been, if he had properly served the plaintiff, upon its list and served by plaintiff.

That so far as the employees Rightmire and Duncan are concerned, while they may have signed the original agreements with the partnership, all of these contracts were sold and transferred to the corporation and were continued between the individual employee and the corporation thereafter, and the employees may never have known any change in management or obligation and continued as they had previously, but this they learned in the natural course of administration.

In further answer to Charles P. Brewer's affidavit, in response to the Order to Show Cause, he says that the customers formerly served by the plaintiff has sought his service because dissatisfied with that of the plaintiff (pages 4 and 5). He was familiar with Paramount and its service in this state during all of that period of time and if there was any dissatisfaction with plaintiff's service, it was due to Brewer's action as the franchised agent of plaintiff in this state. His statement that he does not intend to solicit plaintiff's customers in the future is because he has, through his action, practically acquired many, if not all, and at least the most substantial of plaintiff's accounts, so his promise to refrain from further solicitation is a nullity so far as the business of the plaintiff is concerned.

Attached hereto is a list of plaintiff's accounts, with their contract number, name of the business and its location, which also appear in the defendant's claim of business, marked "Exhibit A" and incorporated in this affidavit to show the extent of the defendants' acquisition of plaintiff's business.

Further, deponent sayeth not.

DeGRAY S. BROOKS.

Subscribed and sworn to before me this 17th day of November, 1947.

[Seal]

ZELDA E. MILLER,

Notary Public for Oregon.

My Commission expires June 11, 1949.

Service of the foregoing Counter affidavit by receipt of a duly certified copy thereof, as required by law, is hereby accepted in Multnomah County, Oregon, on this 17th day of November, 1947.

/s/ E. F. BERNARD,

Attorney for Defendants.

[Endorsed]: Filed November 17, 1947. [57]

[Title of District Court and Cause.]

PRELIMINARY MEMO

Until there is disclosure in more detail of the secret nature of the processes, I do not feel that I should issue an injunction. An early pre-trial and trial date can be obtained through Clerk DeMott.

Dated November 18, 1947.

CLAUDE McCOLLOCH,

Judge.

[Endorsed]: Filed November 18, 1947. [58]

[Title of District Court and Cause.]

ORDER

The above-entitled action coming on to be heard on the motion of the plaintiff for a temporary restraining order and on the order to show cause why a preliminary injunction should not be issued, the plaintiff appearing by Robert R. Rankin and F. Leo Smith, of its attorneys, and the defendants Charles P. Brewer, Rosalie Brewer, Raymond Rightmire and Earl Merriott appearing by their attorneys, Plowden Stott and E. F. Bernard,

It is Ordered by the court that the motion for a restraining order be and hereby is denied and that a preliminary injunction do not issue.

Dated this 19th day of November, 1947.

CLAUDE McCOLLOCH,
District Judge.

[Endorsed]: Filed November 19, 1947. [59]

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS CHARLES P.
BREWER, ROSALIE BREWER, RAY-
MOND RIGHTMIRE and EARL MERRIOTT

For their answer to the plaintiff's complaint the defendants Charles P. Brewer, Rosalie Brewer, Raymond Rightmire and Earl Merriott admit, deny and allege as follows:

First Defense

1. The defendants admit Paragraph numbered I of the complaint except the defendants deny that they have performed any unlawful conduct.

2. The defendants admit Subdivision (a) and (b) of Paragraph numbered II of the complaint save and except the defendants deny that the plaintiff has been engaged in the business described in the State of Oregon.

The defendants deny Subdivision (c) and (d) of Paragraph numbered II of the complaint.

3. The defendants admit that the defendant Charles P. Brewer and the plaintiff signed an agreement of which Exhibit numbered One, attached to the plaintiff's complaint, is a copy. The defendants admit that thereafter the agreement was modified to provide so that Paragraph numbered 5 of the agreement would be eliminated and that in lieu thereof the plaintiff and the defendant Charles P. Brewer would each be entitled to one-half of the net profits from the business after payment of all expenses. The defendants further admit that the defendant [60] Charles P. Brewer on or about the 6th day of February, 1947 paid the plaintiff the sum of \$250.00; and on or about the 6th day of March, 1947 the sum of \$250.00; and on or about the 13th day of March, 1947 the sum of \$494.25; and the sum of \$259.61 on or about July 9, 1947. The defendants further admit that the plaintiff agreed to send a salesman and service man from its main office at Oakland, California to eastern Oregon to build up

the business and that the plaintiff would pay the salaries and expenses thereof in the first instant, and that any profit or loss in expense in said venture would be shared equally between the plaintiff and the defendant Charles P. Brewer.

The defendants further admit that the defendant Raymond Rightmire is a resident of and an inhabitant in the State of Oregon and that the defendant Rosalie Brewer is now and at all times mentioned was the wife of the defendant Charles P. Brewer and a resident of and an inhabitant in the State of Oregon and assisted Charles P. Brewer in his business. The defendants admit that the defendant Earl Merriott is now and at all times mentioned in the complaint has been a resident of and an inhabitant in the State of Oregon and was employed by the plaintiff through the defendant Charles P. Brewer.

Save and except as herein expressly admitted, the defendants deny Paragraph numbered III of the complaint and the whole thereof.

4. The defendants deny Paragraph numbered IV of the complaint and the whole thereof.

5. The defendants deny Paragraph numbered V of the complaint and the whole thereof save and except the defendants admit that the defendant Charles P. Brewer signed the letter, a copy of which is set forth in Subdivision (1) of Paragraph V.

6. The defendants deny Paragraphs numbered VI, VII and VIII of the complaint and the whole thereof. [61]

Second Defense

About the month of November, 1946 the plaintiff and the defendant Charles P. Brewer agreed that the contract of which Exhibit One, attached to the plaintiff's complaint, is a copy should be changed and modified as of the date of the execution thereof and continuing for the full term of the contract to this effect, that Paragraph 5 of the contract should be eliminated and that in lieu thereof the plaintiff and the defendant Charles P. Brewer should each receive fifty per cent of the net profits of the operation of the business after the payment of all expenses incidental to the operation of the business. The plaintiff and the defendant Charles P. Brewer from that time on continued to operate under the agreement as modified until about the month of July, 1947 when the plaintiff notified the defendant Charles P. Brewer that it would no longer continue the performance of the contract as modified and that the defendant Charles P. Brewer would from that time on be required to pay to the plaintiff twenty per cent of the gross business done by the defendant Charles P. Brewer. For that reason and because of the plaintiff's repudiation by the plaintiff of the contract as modified, the defendant Charles P. Brewer wrote his notice of resignation as set forth in Paragraph numbered V of the complaint.

Counter-Claim

That when the employment of the defendant Charles P. Brewer was terminated, as set forth in the Second Defense of this answer, the defendant

Charles P. Brewer turned over to the plaintiff supplies and equipment belonging to him used in connection with the business under the agreement of the plaintiff that it would pay him the reasonable value thereof together with all sums which might be due to the defendant Charles P. Brewer by reason of his performance of the contract as modified. [62] That there is due and owing to the defendant Charles P. Brewer from the plaintiff the sum of \$700.00 by reason of his performance of the contract as modified and that the reasonable value of the supplies and equipment belonging to the defendant Charles P. Brewer turned over by him to the plaintiff is in the sum of \$1350.00. By reason thereof the plaintiff is indebted to the defendant Charles P. Brewer in the sum of \$2050.00.

Wherefore, the defendants pray that the plaintiff's complaint be dismissed and that they have and recover from the plaintiff their costs and disbursements. And the defendant Charles P. Brewer prays that he have the judgment of \$2050.00 against the plaintiff and for his costs and disbursements.

**PLOWDEN STOTT,
E. F. BERNARD.**

Service of the foregoing Answer of Defendants Charles P. Brewer, Rosalie Brewer, Raymond Rightmire and Earl Merriott is hereby acknowledged this 21 day of November, 1947.

/s/ ROBERT R. RANKIN,

Of attorneys for Plaintiff.

[Endorsed]: Filed November 24, 1947. [63]

[Title of District Court and Cause.]

REPLY TO COUNTER-CLAIM

For Reply to the Counter-claim of defendant, Charles P. Brewer, plaintiff alleges:

Denies said counter-claim and each allegation and sum therein alleged; and alleges the plaintiff has either paid or given credit in its accounting as alleged in its complaint for any and all property or sums due from plaintiff to said defendant.

Wherefore plaintiff prays for the relief as alleged in its complaint.

KENNETH C. GILLIS,
F. LEO SMITH,
/s/ ROBERT R. RANKIN.

United States of America,
District of Oregon—ss.

Due service of the foregoing reply is hereby admitted in Portland, Oregon, this 24th day of November, 1947.

/s/ E. F. BERNARD,
Of Attorneys for Defendants.

[Endorsed]: Filed November 24, 1947. [64]

In the District Court of the United States
for the District of Oregon

Civil No. 3936

PARAMOUNT PEST CONTROL SERVICE, a
corporation,

Plaintiff,

vs.

CHARLES P. BREWER, et al.,

Defendants.

MEMORANDUM OPINION

There are equities on both sides in this case, but it seems to me the controlling factor is the time element. If that question were presented singly, I would not think I should enjoin defendant generally from re-engaging in the pest control business; but, if this were August 1947, I might feel that defendant should be restrained from doing business with plaintiff's former customers, as customers' lists are protected by the law.

Considerable time has gone by and the interests of the 140 odd third parties who have continued service with the defendant have to be kept in mind. So an injunction will be denied.

As to damages, I may need to hear the parties further, if they are not able to adjust their differences.

Dated January 30, 1948.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed January 30, 1948. [65]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Be It Remembered that the above-entitled action came on regularly for trial, the plaintiff appearing by its officers and Robert R. Rankin, F. Leo Smith, and Kenneth C. Gillis, its attorneys, and the defendants Charles P. Brewer, Rosalie Brewer, Raymond Rightmire, and Earl Merriott (hereinafter referred to as the defendants) appearing in person and by Plowden Stott and E. F. Bernard, their attorneys. And the court having heard and considered the evidence and the arguments of counsel and having considered the matter and being now fully advised makes the following

FINDINGS OF FACT

I.

During the month of November, 1946 the plaintiff and the defendant Charles P. Brewer mutually agreed that Paragraph No. 5 of the Franchise Agreement between them—of which Exhibit 1 attached to the Complaint is a copy— [66] should be altered and modified and it was at that time agreed that instead of the agent paying the company twenty per cent (20%) of the gross business done by the agent, the net profits of the business beginning as of the 1st day of July, 1946 and continuing throughout the term of the Franchise Agreement should be divided between the plaintiff and the defendant Charles P. Brewer on a 50-50 basis.

II.

The defendant Charles P. Brewer continued the business under the agreement as modified and about the 30th day of June, 1947 the plaintiff in violation of its agreement repudiated the contract as modified and notified the defendant Charles P. Brewer that he would thereafter be required to pay the plaintiff twenty per cent (20%) of the gross business done by him.

III.

Because of the repudiation by the plaintiff of the contract as modified, the defendant Charles P. Brewer sent in his resignation as agent to be effective August 1, 1947.

IV.

Since the 1st day of August, 1947, the defendant Charles P. Brewer has engaged in the pest control business and has solicited some of the customers of the plaintiff and has been servicing upwards of one hundred customers of the plaintiff. The issuance of an injunction would deprive such persons of uninterrupted pest control service. The defendants Raymond Rightmire and Earl Merriott have been employed by the defendant Charles P. Brewer in his pest control business. [67]

V.

The plaintiff did not disclose to the defendant Charles P. Brewer or to any of the other defendants any receipts, formulae, or secret processes and *at* the defendant Charles P. Brewer has not used in his business any receipts, formulae or processes of the plaintiff.

VI.

~~The franchise referred to in the plaintiff's complaint, of which Exhibit 1 is a copy, is not fair and reasonable.~~

From the foregoing Findings of Fact the court makes the following

CONCLUSIONS OF LAW

Damages & costs to neither party

I.

~~The plaintiff is not entitled to an injunction against the defendants.~~

II.

~~A judgment should be entered against
for the sum of \$.....~~

Dated this 14th day of February, 1948.

CLAUDE McCOLLOCH,

United States District Judge.

Service of the foregoing Findings of Fact and Conclusions of Law is accepted this 12th day of February, 1948.

R. R. RANKIN,

By G. E. BIRNIE,

Of attorneys for Plaintiff.

[Endorsed]: Filed February 14, 1948. [68]

In the District Court of the United States
for the District of Oregon

No. Civ. 3936

PARAMOUNT PEST CONTROL SERVICE, a
corporation,

Plaintiff,

vs.

CHARLES P. BREWER, et al,

Defendants.

JUDGMENT

Be It Remembered that the above-entitled cause came on regularly for trial, the plaintiff appearing by its officers and Robert R. Rankin, F. Leo Smith, and Kenneth C. Gillis, its attorneys, and the defendants Charles P. Brewer, Rosalie Brewer, Raymond Rightmire and Earl Merriott appearing in person and by Plowden Stott and E. F. Bernard, their attorneys. And the court having heretofore signed Findings of Fact and Conclusions of Law, it is

Ordered, Adjudged and Decreed that an injunction against the defendants be and hereby is denied.

It Is Further Ordered, Adjudged and Decreed that the Complaint be dismissed without costs.

Dated this 14th day of February, 1948.

CLAUDE McCOLLOCH,

United States District Judge.

[Endorsed]: Filed February 14, 1948.

Entered in Docket February 14, 1948. [69]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Paramount Pest Control Service, a corporation, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from the final judgment entered in this action on February 14, 1948, and the whole thereof.

Dated this 12th day of March, 1948.

KENNETH C. GILLIS,

ROBERT R. RANKIN,

Attorneys for Appellant, Paramount Pest Control Service, a Corporation.

[Endorsed]: Filed March 12, 1948. [70]

[Title of District Court and Cause.]

POINTS ON WHICH APPELLANT INTENDS TO RELY.

Appellant cites the following points on which it intends to rely for reversal of the judgment of the District Court of the United States for the District of Oregon, Honorable Claude McColloch, Judge, and claims said trial court Failed To:—

1. Find the appellant was engaged in Oregon in the business described in its Complaint and denied in the Answer.

Supporting Record: Complaint; Answer; Testi-

mony of T. C. Sibert, E. W. Bushing, C. Wendell Fisher, DeGray Brooks; and Exhibits.

2. Find all respondents had made and performed an unlawful conspiracy to (a) breach the valid written and subsisting contracts between appellant and respondents Charles P. Brewer, Raymond Rightmire and customers of appellant and (b) to deprive appellant of its established business in Oregon.

Supporting Record: Pleadings; Transcript of Testimony; exhibits and Respondents' Answers to Interrogatories.

3. Enjoin, generally, respondents and their representatives from continuing said conspiracy, including the interference with appellant's customers whether under contract or not; Specifically Enjoining Charles P. Brewer from violating his contract in connection with appellant's business and preventing him for a period of three years from August 1, 1947, from soliciting or serving appellant's customers; Specifically Enjoining respondent Raymond Rightmire for said period from working for any other pest control firm but appellant, and Issue both a temporary and permanent injunction in the Court's orders of November 18, 1947 and February 14, 1948.

Supporting Record: Pleadings, Answers to Interrogatories, Transcript of Testimony, Exhibits, Court's Memoranda of November 18, 1947 and January 30, 1948.

4. Find there was undue and unpaid to appellant the following sums of money and entering judgment therefor, to wit:

(a) Against respondent Charles P. Brewer, on agreements to pay for \$6,155.84.

Supporting Record: Exhibits 36, 39, 40, 40(a), 50, 51, 51(a) and testimony of Harold Hiltz, Pleadings and Testimony.

(b) Against all respondents, jointly and severally, for damages, \$6,796.95.

Supporting Record: Exhibits 53, 54, 55; Pleadings and Testimony.

5. Enter judgment for costs in favor of appellant.

Supporting Record: Entire Record.

Dated this 16th day of March, 1948.

/s/ KENNETH C. GILLIS,

/s/ ROBERT R. RANKIN,

Attorneys for Appellant.

Service of the within Points on which Appellant intends to rely, by receipt of a duly certified copy thereof, is hereby accepted at Portland, Oregon, this 16th day of March, 1948.

/s/ E. F. BERNARD,

of Attorneys for Appellees.

[Endorsed]: Filed March 17, 1948. [72]

[Title of District Court and Cause.]

ORDER DIRECTING TRANSMITTAL OF
ORIGINAL EXHIBITS

This matter came on for hearing on motion of the plaintiff for an order directing that the original exhibits be sent to the appellate court in lieu of copies; and

It appearing to the Court that a Notice of Appeal and Bond has been filed herein and the Court being of the opinion that the Appellate Court shall have the original exhibits for inspection on such appeal;

It is hereby Ordered that all the original exhibits offered or received in evidence in this court and the deposition of Chas. P. Brewer (McC) be sent to the Circuit Court of Appeals for the Ninth Circuit, in lieu of copies thereof, and that the sending of said originals shall in no way be construed to indicate which of said exhibits shall or shall not be printed in the Transcript of Record on appeal.

Dated this 16th day of March, 1948.

CLAUDE McCOLLOCH,
Judge.

OK E F Bernard.

[Endorsed]: Filed March 17, 1948. [73]

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TO THE BANK OF CALIFORNIA, N. A., PORTLAND, OREGON

NAME Charles P. Brewer

EXHIBIT 77
3936

Married ☒
or Single

BUSINESS Paramount Pest Control Service 519 N.W. Park Ave. Portland, Ore

For the purpose of procuring credit from time to time with you for my negotiable paper or otherwise, I furnish the following as a true and accurate statement of my financial condition on MAY 31, 1947, which may hereafter be considered as representing a true statement of my financial condition unless written notice of change is given you.

ASSETS		LIABILITIES	
Cash on Hand	\$ -	Notes Payable:	
Cash in Bank of California	75.10	To Bank of California	-0-
Cash in <u>First Nat</u> Bank	75.00	To Other Banks	-0-
Total Cash	150.10	For Merchandise	-0-
Notes Receivable and Trade Acceptances (Good—Not Overdue)	-0-	To Relatives and Friends	-0-
Accounts Receivable (Good—Not Overdue)	3 624.56	To Others	-0-
Saleable Merchandise (how valued)	756.84	Accounts Payable:	
Raw Material (how valued)	-0-	For Merchandise	-0-
Cash Value of Life Insurance	-0-	To Relatives and Friends	-0-
		To Others <u>Paramount Pest Cont.</u>	2 759.63
		Trade Acceptances	
Total Current Assets	4 521.50	Taxes Unpaid	159.42
		Borrowed on Life Insurance	
		Total Current Liabilities	2 919.05
Real Estate and Buildings (as per Schedule on Back)	5 250.00	Mortgages or Liens on Real Estate	1012.10
Machinery and Tools	1 085.77	Chattel Mortgages or Contracts (Covering ———)	
Autos and Trucks	1 836.00	When Due ———	
Furniture and Fixtures	735.20	Other Liabilities (itemize below)	
Investments in Stocks and Bonds (as per Schedule on Back)		Depreciation	734.00
Notes, Trade Acceptances and Accounts Receivable (Past Due)	-0-	Due to Employees	5.00
Other Assets (itemize below)		Total Liabilities	6 870.78
<u>personal furniture</u>	2 100.00	NET WORTH	8,667.69
Total	15 536.47	Total	15, 536.47

CONTINGENT LIABILITIES

Notes Endorsed for Other Parties

None

Notes and Accounts Receivable, Discounted or Sold and Not Included in Assets Enumerated Above

None

Other Contingent Liabilities

None

Specify any of above Assets pledged as collateral and the Liabilities for which they are security

None

PROFIT AND LOSS ACCOUNT

Business Results for year ending <u>6/1/46</u> to <u>5/31/47</u>	Gross Sales	33,394.30
Total Expenses for the Year	13,379.16	10,015.44
Bad Debts charged off	1,415.05	-0-
Depreciation charged off	734.00	-0-
Net Profit	6,966.09	-0-

OVER - CONTINUED ON REVERSE

Life Insurance Beneficiary is Rosalie Brewer
 Fire Insurance on Machinery and Fixtures \$ 1500.00 Buildings \$ 4,000.00 Merchandise \$ 1000.00 Amount \$ 5000
 Accident Insurance \$ 50,000 Liability Insurance \$ 100,000 Total \$ 6500.00

Regular times for closing books and taking inventory. 6/30/47
 Is this statement based on inventory estimate? yes
 Are books audited by yourselves or certified public accountant? C. P. A.
 If C.P.A., give name and date of last audit. L. Prantx & Co.
 Average Terms: Buying 30 days Selling 30 days
 Time of year when notes and accounts rec. of customers uncollected are generally maximum Aug. minimum Jan.
 Time of year when stocks of merchandise on hand are generally maximum Aug. minimum Jan.
 Time of year when liabilities are maximum Aug. minimum Jan.
 BANK ACCOUNTS: Where kept, in addition to this bank. First Nat Bank.

Are any suits pending against you? NO Claims (for income tax, etc.)

REAL ESTATE SCHEDULE (IMPORTANT THAT CORRECT LEGAL DESCRIPTION BE GIVEN)

LEGAL DESCRIPTION		RENTAL PER MONTH	TITLE IN NAME OF	VALUE OF		MORTG. CONTRACTS OR LIENS		INSURANCE ON BUILDINGS
ADDITION	LOT BLOCK			GROUND	BUILDINGS	AMOUNT	WHEN DUE	
So. 40ft. of	20		Charles & Rosalie Brewer		5250.00	3612.10 Monthly		4000
4929 N. E. 28th Ave.,								
Portland, Ore.								
TOTALS								

N. B.—If property is acreage describe by meters and bounds. If city property by lot and block number.

SCHEDULE—STOCKS AND BONDS

DESCRIPTION	IF STOCK SHARES	IF BONDS DUE	RATE	PAR VALUE	MARKET VALUE	EARNED BY

REFERENCES:

Name _____
 Address _____
 Name _____
 Address _____

SIGN HERE Charles P. Brewer
 DATE June 24 1947

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF RECORD

Appellant designates the following matters to be contained in the "Transcript of Record":—

Pleadings: Complaint, Order to Show Cause, Answers of Charles P. Brewer, Rosalie Brewer, Earl Merriott and Raymond Rightmire to Interrogatories, all dated November 15, 1947, Court's memorandum of November 18, 1947, Court's Order of November 19, 1947, Answer of defendants, Reply, Memorandum Opinion of January 30, 1948, Findings of Fact, Conclusions of Law, Judgment, Notice of Appeal, Designation of Record, Statement of Appellant's Points, Order transmitting original exhibits.

Evidence: Transcript of Testimony, pages 1 to 409, incl. in question and answer form, deposition of Farries Flanagan, excluding exhibits, deposition of Charles P. Brewer taken January 7, 1948, Exhibits 3, 5, (20), 7, 10, 11, 15, 28, 29, 31, 33, 35, 36, 38, 39, 40, 40(b), 40(c), 46, 47, 48, 49, 50, 51, 51(a), 53, 54, 55 (omitting Form 7 of contracts because of duplication with Exhibit 11), 56, 57 to 60, incl., 60(a), 61, 61(a), 61(b), 62 (including title of case and Par. V, Sections (1) and (5) to end of paragraph, omitting the residue).

ROBERT R. RANKIN,

Of Attorneys for Plaintiff-
Appellant.

[Endorsed]: Filed March 17, 1948. [76]

[Title of District Court and Cause.]

APPELLEE'S DESIGNATION OF ADDITIONAL PORTIONS OF THE RECORD

Appellees designate the following matters to be contained in the Transcript of Record:

Affidavit of Charles P. Brewer in Response to Order to Show Cause;

Pre-Trial Order;

Defendants' Exhibit No. 77.

/s/ E. F. BERNARD,

Of Attorneys for Defendants-Appellees.

PLOWDEN STOTT,

COLLIER & BERNARD,

WM. K. SHEPARD,

Attorneys for Defendants-Appellees.

Service of the foregoing Appellee's Designation of Additional Portions of the Record is acknowledged this 26th day of March, 1948.

R. R. RANKIN,

By G. E. BIRNIE,

Of Attorneys for Plaintiff.

[Endorsed]: Filed March 26, 1948. [77]

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF
ADDITIONAL RECORD

Appellant designates the following matters to be contained in the Transcript of Record:

Affidavit of T. C. Sibert, October 22, 1947, supporting motion for restraining order; affidavit of deGray S. Brooks answering affidavit of Charles P. Brewer, dated November 17, 1947.

(Note: No pretrial order was ever signed by the Court.)

Dated this 26th day of March, 1948.

/s/ ROBERT R. RANKIN,
Of Attorneys for Plaintiff-
Appellant.

Service of the foregoing "Appellant's Designation of Additional Record" by receipt of a duly certified copy thereof, is hereby accepted at Portland, Oregon, this 26th day of March, 1948.

E. F. BERNARD M.E.S.
Of Attorneys for Defendants-
Appellees.

[Endorsed]: Filed March 26, 1948. [78]

[Title of District Court and Cause.]

DOCKET ENTRIES

1947

Oct. 24—Filed Complaint.

Oct. 24—Issue summons—to Marshal.

Oct. 24—Filed motion for restraining order.

Oct. 24—Filed & entered order to show cause on
Nov. 17, 1947—10 a.m. why preliminary
injunction should not issue. McC.

Oct. 30—Filed summons with Marshal's return.

Nov. 15—Filed answer of Charles P. Brewer to in-
terrogatories.

Nov. 15—Filed answer of Rosalie Brewer to inter-
rogatories.

Nov. 15—Filed answer of Earl Merriott to interroga-
tories.

Nov. 15—Filed answer of Raymond Rightmire to in-
terrogatories.

Nov. 15—Filed affidavit of Charles P. Brewer re
show cause order.

Nov. 17—Filed Return of service of writ.

Nov. 17—Filed affidavit counter to Charles P. Brew-
ers affidavit.

Nov. 17—Record of hearing on order to show cause
why preliminary injunction should not
issue—argued & order taking under ad-
visement & entered order allowing deft. to
Nov. 24 to answer. McC.

Nov. 18—Filed preliminary memo.

1947

- Nov. 19—Filed & entered order denying motion for restraining order and preliminary injunction. McC. Notices.
- Nov. 19—Entered order setting for pre-trial conference Nov. 24, 1947. McC. Notices.
- Nov. 24—Filed Answer of defts. C. P. & Rosalie Brewer—R. Rightmire & E. Merriott.
- Nov. 24—Record of pre-trial conference.
- Nov. 26—Entered order setting for further pre-trial conference on Dec. 26, 1947. McC.
- Nov. 24—Filed reply to counterclaim.
- Nov. 29—Entered order setting for trial on Jan. 20, 1948—10 a.m. Notices. McC.
- Dec. 26—Record of pre-trial hearing. McC.

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- Jan. 6—Issued subpoena & 15 copies to Atty. G. E. Bernie.
- Jan. 6—Filed Notice to take Deposition of deft. Chas. P. Brewer.
- Jan. 7—Filed notice of deft. to produce.
- Jan. 7—Pre-trial order submitted to J. McC.
- Jan. 14—Filed motion of defts. for inspection of documents.
- Jan. 14—Filed Transcript of Proceedings Dec. 26, 1947.
- Jan. 14—Filed Deposition of Charles P. Brewer.
- Jan. 14—Issued subpoena & 1 copy to Atty. Bernie.
- Jan. 14—Filed Stipulation for deposition of Harry Flannagan.
- Jan. 15—Filed answer to motion for inspection.

1948

- Jan. 15—Filed & entered order denying motion for inspection. McC.
- Jan. 19—Filed Deposition of Farries Flanagan.
- Jan. 20—Entered order that Kenneth C. Gillis be permitted to appear specially in this case. record of trial before court. McC.
- Jan. 21—Record of trial before court resumed & cot'd to Jan. 23, 1948—10 a.m. McC.
- Jan. 23—Record of trial before court resumed & order dismissing without prejudice as to deft. Carl Duncan on court's own motion. McC.
- Jan. 24—Record of further trial before court—argument—& order taking under advisement. McC. [79]
- Jan. 30—Filed Memorandum Opinion. McC. Copies to attys.
- Feb. 11—Lodged proposed Findings of ptff.
- Feb. 14—Filed & entered Findings of Fact & Conclusions of Law. McC.
- Feb. 14—Filed & entered Judgment, denying injunction & dismissing without cost. McC.
- Mar. 12—Filed notice of appeal by plntf.
- Mar. 12—Filed bond on appeal.
- Mar. 17—Filed designation of contents of record.
- Mar. 17—Filed points on which appellant will rely.
- Mar. 17—Filed Vol. 1 & 2 transcript of proceedings, Jan. 20, 21, and 23, 1948, in duplicate.
- Mar. 17—Filed motion for order directing transmittal of original exhibits.

1948

Mar. 17—Filed and entered order directing transmittal of original exhibits McC.

Mar. 22—Filed Transcript of Proceedings Jan. 20, 21, 23, 1948.

Mar. 25—Copies of notice of appeal to attorneys.

Mar. 26—Filed appellee's designation of additional portions of record.

Mar. 26—Filed appellant's designation of additional record.

United States of America,
District of Oregon—ss.

CERTIFICATE OF CLERK

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 81 inclusive constitute the transcript of record on appeal from a judgment of said Court in a cause therein numbered Civil 3936, in which Paramount Pest Control Service, a corporation, is Plaintiff and Appellant, and Charles P. Brewer et al, are defendants and Appellees; that the said transcript of contests has been prepared by me in accordance with the designations of contents of the record on appeal filed by the appellant and appellees, and in accordance with the rules of this court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with

the said designations as the same appear of record and on file in my office and in my custody.

I further certify that I have enclosed under separate cover a duplicate transcript of the testimony taken and filed in this office in this cause, of proceedings on January 20, 21, 23, 1948, together with exhibits Nos. 3, 5-20, 7, 10, 11, 15, 28, 29, 31, 33, 35, 36, 38, 39, 40, 40-b, 40-c, 46, 47, 48, 49, 50, 51, 51-a, 53, 54, 55 (omitting form 7 of contracts because of duplication with exhibit 11), 56, 57, 58, 59, 60, 60-a, 61, 61-a, 62, filed in this office.

I further certify that the cost of comparing and certifying the within transcript is \$65.30 and the cost of filing the notice of appeal is \$5.00, making a total of \$70.30, and that the same has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 6th day of April, 1948.

[Seal]

LOWELL MUNDORFF,

Clerk,

By /s/ F. L. BUCK,

Chief Deputy. [81]

In the District Court of the United States
for the District of Oregon

Civil No. 3936

PARAMOUNT PEST CONTROL SERVICE,
a corporation,

Plaintiff,

vs.

CHARLES P. BREWER, et al.,

Defendants.

Portland, Oregon

Tuesday, January 20, 1948, 10:00 o'Clock A.M.

Before: Honorable Claude McColloch,
Judge.

Appearances:

Mr. R. R. Rankin and Mr. Leo Smith, Attorneys
for Plaintiff; Mr. Kenneth C. Gillis (Oakland, Cali-
fornia), of Counsel for Plaintiff.

Mr. Earl A. Bernard and Mr. Plowden Stott, At-
torneys for Defendants.

Court Reporter: Ira G. Holcomb. [1]

PROCEEDINGS OF TRIAL

Mr. Rankin: We are ready to proceed on behalf
of the plaintiff, your Honor.

Mr. Bernard: The defendants are ready, your
Honor.

The Court: Proceed. Call a witness.

Mr. Rankin: May I respectfully suggest to the
Court that an opening statement would be of as-
sistance, in order that you may have the matter in
mind.

The Court: Yes. I have heard it discussed two or three times.

Mr. Rankin: You do not care for an opening statement, then?

The Court: Go ahead, if you want to make it.

Mr. Rankin: The suit, your Honor, is against, primarily, Charles P. Brewer, based upon the language in the franchise, which is admitted, that he agreed not to, either as an employee, employer or otherwise, canvass, solicit or cater to any of the customers of the company which he may have known of because of his employment by the company, for a period of three years after the employment ceased.

It is against three employees of the company, Duncan, Rightmire and Merriott. They are, in turn, divided into different classifications. Rightmire is one who signed a statement to the effect that he would not work for any other pest control firm for a period of three years after the termination of any employment with this company. [2*]

Duncan has never been served. We have tried diligently to make service upon him and, so far as we know, he has never been in the jurisdiction since this action was brought.

Merriott is a man who was hired by Mr. Brewer. Under Mr. Brewer's sales agency agreement, he was presumed to sign these men on contracts similar to that which Duncan and Rightmire signed, but Mr. Brewer, for purposes of his own, did not so sign Mr. Rightmire.

* Page numbering appearing at top of page of Reporter's certified Transcript of Record.

Rosalie Brewer is the wife of the defendant Charles P. Brewer. She never was in the employ of Paramount Pest Control Service but aided and assisted her husband when he was their agent here under the franchise agreement, and did also aid and assist her husband after the termination of this agreement.

Both Merriott and Rosalie Brewer are charged as co-conspirators with the others because they knowingly and willfully entered into a conspiracy to break these contracts and aid and abet others in the violation of their agreements—knowingly, because we will show in this case that these parties did flagrantly—and I mean by “flagrantly,” upon their own volition—terminate their agreements and association with Paramount Pest Control Service as of August 1, 1947.

Within a week thereafter a suit was brought in the State court by the plaintiff to enjoin them from that practice. The case was dismissed on the ground that there had not been a qualification of this foreign corporation in Oregon so that it had the benefits of the courts. The merits of the case were not at that time gone into. Subsequently that qualification for entrance into this state was complied with, and then this suit was brought in this court charging these parties, all of them, with conspiracy, and particularly from that complaint in the State court, all of these matters concerning these contracts were known to the defendants, therefore, who are the same as the defendants herein and who continued thereafter, until this complaint was brought, and

afterwards, to violate that contract and to aid and abet each other in that violation.

When it comes to the damage part of the case, it is our position that, equity having taken jurisdiction of this case for the purpose of an injunction, damages are likewise recoverable even in equity, and the gross amount of damages that are alleged in the complaint in the various items amount to \$15,175. There will be much more to be said on the item of damages as we progress in the trial of the case.

The testimony, your Honor, will be rather long and detailed because it involves, first, the history of the company. The defendants claim that we are not doing the business in Oregon that we say we are doing, and the only way to do that, as I see it, is to show what business we did do and then show what we are authorized to do, and then show what we did in Oregon, and to show this in some detail as to the composition of poisons and so forth. In fact, for my own convenience, I have divided [4] the services of this company in this insecticide control into three phases and I hope they will be of as much benefit to the Court as they have been to me.

First is the detailed study of the poisons. That is necessary here because the defendants say that these are not unusual, that you can go on the common market and buy them. We distinctly remember this Court's statement that until something more definite is shown concerning these formulas, no temporary injunction would be granted.

These poisons are divided into two classes, one of which is common—common because the laws of Cali-

fornia under which these people operate—and which the evidence will show is the most severe state in the Union on regulations—require that all poisons be registered and, so, these are registered, even though common poisons.

These poisons are all put out under the brand and label of Paramount Pest Control Service. There is a lethal quality in practically all of them—there may be one exception. The composition of them is unique in that the evidence will show that if you use A, B, C and D and mix them in that order you get one result, whereas if you mix, say, A, C, D, B, you would get a different result.

Next, after we get through with poisons, there is the study of the insects to which the poison is applicable, because some of these poisons penetrate the reproductive glands; others [5] kill anything that comes in contact only; so it requires, the evidence will show, a knowledge of the bug itself or the pest itself, a knowledge of its habits and so on.

Then the third classification is that of the application, that is, to bring these two together, the poison and the pest. That is done by a long study of what is the most effective method of accomplishing this purpose what they will take and what they won't take. Some are sweet-loving insects and you have to have a basis of sugar or something of that nature. Others have different qualities, but I shall not go into the subject further than to state to the Court that this is not just an unusual or ordinary situation.

For example, they make a rat poison. You can buy rat poison on the common market, but we will endeavor to show, and I think the evidence will show to the Court, that this rat poison has a different quality.

Then this case involves an accounting, in order to show these items of damage. I will say to the Court that I have listed, on a little separate memorandum which is not an exhibit in the case, a summary of all of the allegations of damage we are alleging in the complaint, how much they amount to and what exhibits are offered in evidence to prove those. This I will give to the Court and to counsel simply as a convenience. It is not in evidence in the case but it may be used simply as a convenience to follow through. [6]

The practice of this, your Honor, is to bring about a determination of whether these parties are entitled to continue their practices, if not enjoined and, if there is any right to compensation in a monetary form, to recover.

A word about the parties so that the Court may know about whom we are talking at every stage of the case, from the very inception. The plaintiff is the Paramount Pest Control Service. It is a California corporation. It was incorporated in July, 1947.

Prior to that time, for several years, the Paramount Pest Control Service was a partnership consisting of T. C. Sibert. Its Vice-President is Mr. Glenn Fisher. Its Secretary-Treasurer is the accountant in the firm, Mr. Harold Hilts.

The principal defendant is Mr. Charles P. Brewer. Mr. Brewer was at one time a very close and intimate friend of the Siberts. They had known each other for some time. Mr. Brewer came to Mr. Sibert and asked if there was not a place for him in this Paramount Pest Control Service. He said he was interested in coming to the Northwest.

It so happens that very shortly after that, and before Mr. Brewer's training—and, by the way, there is very diligent training given these employees, because they are dealing with a lethal quantity and quality all the time.

Before that training was completed entirely, this opening occurred here and he came up, first under the partnership [7] and then later under the corporation. In a word, the evidence will show that there was every effort made by the plaintiff to aid and facilitate Mr. Brewer in the acquiring or maintenance and increasing of the business in this state.

Rosalie Brewer, his wife, as I previously stated, not an employee of the company, assisted her husband. She was brought up here in May, 1947, and, under the direction of the Secretary-Treasurer of the corporation, put in charge of the books here for her husband so that she could know the system that would be approved by the principal, the Paramount Pest Control Service. She was office manager, signed checks of the Brewer Pest Control Service for her husband and aided and assisted him at all times, either before the breach, when he was under the agency agreement or after the breach when he went in for himself. In fact, we have reason to be-

lieve, I think the evidence will show, that she was probably the primary mover in this separation.

The next is Carl Duncan, whom I will not dwell with except to say that we believe that he is or was a very trusted employee and a very efficient one. We have not been able to get service upon him but I do not understand that militates against showing that he is or was a member of the conspiracy.

The next is Raymond Rightmire. He is a very good pest control man and had been trained in a manner that will be more accurately described later by the Paramount Pest Control Service. He saw fit to throw in his lot with Charles P. Brewer. [8]

Earl Merriott was also an employee of Brewer. He was, in fact, never signed up on any contract.

Now, a word about the pest control business. Both of these parties are engaged in pest control. That will be clearly shown and it is not denied; it is admitted here. But there is a vast difference in the operation of these two businesses.

In the first place, taking the time element, the evidence will show that the plaintiff, or those who comprise its corporation organization now, have been engaged in the business for ten years. There were times when they devoted as high as eighteen hours a day to the business, but they were not experts and they had to learn by the practical method. They devoted a great deal of their money. They had to have jobs in which they earned their living, and then their pest control work was done nights after they had finished their regular jobs from which they could acquire funds to carry on, and as

time went on, with even greater expenditures of money, they created this business. On the other hand, the defendant, the evidence will show, has not even yet had a year's experience in pest control, while the plaintiff has hired entomologists, graduates of college, who have gone through the details of knowing all about bugs, knowing also about poisons. What Mr. Brewer and his associates have gotten has been primarily from the pest control training service conducted by plaintiff and, to a minor degree, from their own research and practical service in the field. [9]

So far as knowledge of insects is concerned, plaintiff, as I say, has these entomologists, while they have no employed entomologists in their concern. They had, from time to time, before this breach occurred, written to the main office as to problems relating to the classification of bugs and so on, but where they write now we don't know. I think it will be of assistance to the Court if I recite the events chronologically.

In January Mr. Brewer made his application. In February he went to work, in training. He ceased that training April 6th and came to Oregon, his training being less than required because of the necessity of having someone in the District of Oregon.

He worked under the partnership from April 6th to July 1, 1946, and in July they signed a contract, when the corporation was not yet formed, which contract was ratified after the corporation was formed.

That franchise—it is a contract, called a sales agent's agreement, July 1, 1946. I think we will find ourselves, for the sake of brevity, repeatedly calling that a franchise, because that is the name that the parties applied to it.

That franchise, however, went into effect and was lived up to until September 12, 1946. There is a dispute between the parties here, Mr. Brewer saying that it continued until November, about Thanksgiving in November. I think the evidence [10] will show the Court that it continued up to September 12, 1946. Mr. Brewer stated that he could not do as if he had a different arrangement, not under the whole contract but only that one part, that of claimants.

I think if the Court will bear with me for a little detail, it will help keep this evidence very much clearer in mind. Section 5 of the franchise agreement provides the agent shall take 80 per cent of the gross and the Paramount Pest Control 20 per cent. Out of the 80 per cent the agent pays the expenses of his operation. That is the franchise, as we shall term it, from time to time.

The experience of the Paramount Pest Control Service shows that it takes about 60 per cent to operate this business, depending on the efficiency of the operator, so we figure that takes about 60 per cent out of the 80 per cent, leaving 20 per cent to the agent and 20 per cent to the company.

After Mr. Brewer's protest of September 12, 1946, that was changed by Mr. Sibert and Mr. Brewer alone, to this effect: Mr. Sibert, at Mr.

Brewer's request, gave him permission to put all he wanted to into his business because that business was his, after it was created, and it was the understanding that when he took a dollar home, that is, when Mr. Brewer took a dollar home he should pay an equal amount to the Paramount Pest Control Service; and that the profits were divided on a fifty-fifty basis because, no matter how large or how small the profits were, on [11] Mr. Brewer's business, that profit could have been plowed into the business to whatever extent Mr. Brewer determined was advisable, save for the obligation that when he took home a dollar he paid an equal amount to the company.

Mr. Sibert omitted to mention that to Mr. Hilts and the matter went on until December when he happened to recall it and then told Mr. Hilts and his associates, and then received approval and ratification for what had been done.

Under Mr. Brewer's statement, he claims he went down there in November and at that time this whole adjustment was made. The evidence, from our standpoint, will show quite the contrary; that there was no business mentioned in November; that it was a vacation trip by Brewer; that he and his wife stayed at the Sibert home as guests of the Siberts and that the most friendly and pleasant relations existed. The only time any business was discussed was when Mr. Brewer went to the office of the company to get some supplies.

This agreement that I have mentioned was to run to the first of the year only, that is, the dollar-home and dollar-company agreement was to run only to the first of the year, at which time it was presumed Mr. Brewer would have created sufficient capital that he could then go on the franchise, and that was undoubtedly Mr. Brewer's conception because in February he made a payment on the franchise, and we have the check to show it. On March 6th he made a payment and we have the check to [12] show it. On the 13th of March he made a final payment, the amount of that payment being consistent only with the amount that was then due under the franchise.

Then, intervening, between the dates of January 1, 1947, and March 13, 1947, Mr. Brewer complained that he should develop this Eastern Oregon territory, where there were large distances to cover and little in between, no towns of any population, a very extensive territory.

They made an agreement, which is entirely separate. It is set out in the pleadings. It was entirely separate and made in order to develop the territory and help Mr. Brewer to accomplish substantial promotion of this business. The Paramount Pest Control Service agreed to send two men to Portland or to Oregon and develop that territory, with a division of salaries and expense and profits and so forth. Only part of that is agreed to by the defendants.

But, because that did not turn out to be profit-

able—and this is the situation wherein we find ourselves very much in disagreement and, therefore, I mention it particularly to the Court. It was Paramount's own idea that they voluntarily give to Mr. Brewer—and it was done without his request and even without his knowledge, after consultation of Sibert and Hilts—a continuation of the dollar-home, dollar-company basis, and Mr. Brewer was written to that effect by a letter which will appear in evidence. There were one or two meetings, but of no particular [13] consequence, as I recall it, until June.

On June 1st, with Mr. Brewer, Mr. Sibert and Mr. Hilts present, they readjusted the whole transaction covering the whole year. They canceled that provision about the franchise, gave him credit for what he had never paid, and continued to carry on.

The principals seemed to be perfectly happy. In fact, Mr. Sibert bought the tickets, because it was Mr. Brewer's child's birthday—bought the tickets to Oakland, California, and they all went down for a very pleasant and satisfactory visit. While they were visiting there, word came in that there had not been some collections made and it was suggested Mr. Brewer was not a good collector, and they retired to their room in some huff and nothing more was said.

On the 24th of July, less than a month thereafter, Mr. Brewer wrote to Mr. Sibert his letter of resignation in which he said he was terminating his agreement as of August 1st, that is, about a week later.

Under his contract his obligation was to at least give the company ninety days' notice. He paid no attention to that. In fact, I think the evidence will show that Mr. Brewer's regard for the contract was something that might as well not have existed throughout this whole proceeding.

Then, with remarkable facility, these defendants started to acquire the contact and patronage that they had acquired at one time for Paramount Pest Control Service.

We have here the applications which are already in [14] evidence and admitted. We also have Mr. Brewer's own sworn reply, showing that from August 1, 1947, until the answer was made in November, he had acquired 141 of the accounts, patrons and customers of the Paramount Pest Control Service, which was definitely in violation, obviously in violation of his agreement.

That gives a running statement, I think, of all that is necessary to give the Court a general outline.

Just a word as to these exhibits. Exhibit No. 45 is a photostatic copy of the mortgage from Mr. Brewer to the Bank of California, which has just been procured. Opposing counsel has had a chance to observe it and reservation for it was made at the pre-trial.

As to Exhibit 28, I feel I ought to explain to opposing counsel that probably I made an error in connection with that. It is a bill of sale made by Sibert and Fisher, as a copartnership, to the Paramount Pest Control Service. There were two or three copies of it made, and I have here a carbon

copy that was fully signed by Mr. Sibert and Mr. Fisher. The copy that was entered in evidence had the notarial acknowledgment on it that this copy does not have, so when I put that in evidence I did not put the copy in evidence without the notarial certificate but I put the other in and it did not have Mr. Sibert's signature. I asked Mr. Sibert to sign it and I thought afterwards that I should have delayed that action on my part until after the Court had been advised and its permission secured, so I now formally call [15] attention of opposing counsel to that fact, and we can either strike Mr. Sibert's signature to that, if it is so desired, or we can introduce the one without the notarial acknowledgment, which does not add anything. I do not care what may be done, but I felt I should call it to the Court's attention.

In conclusion, I thank the Court for its attention in giving me this opportunity. I hope it has been of some assistance. It has been rather sketchy, I feel myself, but we feel that we should be entitled to injunctive relief. It seems to me there has been a complete violation of this agreement and we ask for such damages as the Court may find, from the evidence and these exhibits, that plaintiff is entitled to.

The Court: You have not discussed any law.

Mr. Rankin: No.

The Court: You just seem to take it for granted.

Mr. Rankin: I am perfectly willing to discuss the law. In fact, that has been Mr. Smith's prin-

cipal duty. I didn't know that your Honor wanted it in an opening statement, but there are some cases in Oregon, particularly one case that, it seems to me, we could decide this case on alone. If we are going into any detailed discussion, I would like to have Mr. Smith cover that subject. He is familiar with it, having prepared the brief in the other trial.

It is to this effect, that where we have a contract whereby one party agrees, under proper consideration, to do [16] nothing to interfere with another party's business, that, while they are in restraint of trade, it is a legitimate restraint of trade if anywhere near reasonable, and three years is not unreasonable, not an unreasonable time as the authorities show. Therefore, this conspiracy charge is based on the fact that where he employed Rightmire and where the agent Brewer agreed not to solicit or not to go into a competitive business for a period of three years that the Court will say that that is a proper provision.

The Court: What is the Oregon case you say is the leading authority?

Mr. Rankin: What is the case, Mr. Smith?

The Court: What is the one you claim?

Mr. Smith: 161 Or. 65.

The Court: I will hear you, Mr. Bernard.

Mr. Bernard: I do not care, your Honor, particularly to repeat what I said in my opening statement at the pre-trial. Your Honor possibly will remember our position, that this contract was modified and that modification was to continue through-

out its term and then, suddenly, the plaintiff repudiated that modification, and it was for that reason that Mr. Brewer severed his connection with the company.

Briefly, as to the law—and I am preparing a brief on the subject, not yet in shape to hand to your Honor, but I will hand it to your Honor as quickly as I can get it done. It [17] is our contention, first, that in a case of this kind the burden is on the plaintiff to show that the contract was fair, the restrictive covenants reasonable, and that they have a real relation to and are really necessary for the protection of the plaintiff.

And, speaking of the fairness of this contract, taken in connection with the facts, this young man had been sent up here on a promise of a salary of \$250 a month; he had sold his home in California and one month afterwards he was told he must sign this contract or else he was through. In the various provisions in the contract there is only one thing that the plaintiff promised to do, and that was to furnish such advertising as they might think necessary. We will have something to say later as to the reasonableness of the contract under the circumstances.

Further, we claim the law to be that it must appear that the plaintiff has performed all obligations imposed on it by the contract before plaintiff is entitled to injunctive relief; further, that an injunction will be denied when it appears that plaintiff's conduct in obtaining the contract was unjust

or unfair or in plaintiff acts unjustly under the contract or if the contract is unjustly harsh, unfair or unreasonable or if the entire matter appears to be inequitable.

We will contend, your Honor, that regardless of consideration, the conduct of this company towards this man when [18] they sent him up here, the circumstances under which they obtained the contract, the nature of the contract itself and their repudiation of the modification of it would require this Court or at least give cause to this Court to deny any injunctive relief.

The Court: What did the plaintiff furnish under the contract?

Mr. Bernard: The plaintiff furnished nothing under the contract, your Honor. They furnished an opportunity to this young man to go into the pest control business. As we look at this contract, taking it by its four corners, they sent him up here and said, "You can go to work in the pest control business."

The Court: Why couldn't—

Mr. Bernard: I know what your Honor has in mind.

The Court: No, you don't. Why couldn't he have done it himself?

Mr. Bernard: He could have done it himself. I think you mean, by the terms of the contract.

The Court: Did they provide any financing?

Mr. Bernard: Provided no financing.

The Court: Provide materials and supplies?

Mr. Bernard: I think there were some supplies and materials to start in with, yes, although they were paid for.

The Court: For which he paid?

Mr. Bernard: For which he paid. They are charged against him. In other words, as I look on this contract, what they are [19] actually doing is to levy a 20 per cent tax on his gross business for the privilege of him going into the pest control business in Oregon. They furnished him really with nothing.

The Court: Is it any different from any other concern, say, that wants to open up a new territory somewhere, where they say, "We want you to go up there and work for us and want you to agree that, if you quit us, you won't, within a period of three years, go in the same kind of business?"

Mr. Bernard: There may be something for the Court to consider along the lines of public policy.

The Court: Is it any different from what frequently happens in the commercial world where some concern says, "We are going to open up an agency in Los Angeles," for example, or take a case nearer home. Let's take a case here in Oregon and, as time goes on, they send men out to open up new territories. Is that the question here, whether a man could go out and open up a new territory and bind himself not to go into a competitive business?

Mr. Bernard: That is the very question, your Honor, whether or not they could enforce a contract of that kind.

The Court: Are contracts of that kind enforceable in equity?

Mr. Bernard: I don't think so, no. In other words, I think plaintiff should have been required to furnish something except the mere opportunity to go out and go to work.

The Court: Do you want to speak further, Mr. Rankin?

Mr. Rankin: No, your Honor. [20]

The Court: All right. Proceed with the testimony.

Mr. Smith: May it please the Court, I would like to submit to the Court a trial brief which has been prepared on the subject of contracts, the validity of agreements in restraint of trade, and so forth. At the same time I will give a copy to counsel for the defendants and at this time would also like to request that if the defendants have any citations of authorities in support of their contentions that such a contract is unreasonable, we would appreciate it very much having those citations in ample time so that we may go to the Law Library and study the question in the intervening time and be able to make our arguments at the proper time.

The Court: We have no jury here. Mr. Bernard said he would complete his memorandum as soon as he can. I imagine that will be some time during the day.

Mr. Bernard: I do not want to deceive the Court. It may take me a day or two to get that memorandum in shape. I thought this, your Honor,

it being a case before the Court, that even though I handed it up promptly at the end of the case they would have an opportunity to reply.

The Court: Mr. Smith has just made a special request that if you have any authorities now he would like you to give them to him.

Mr. Bernard: I will have to give them to him later.

Mr. Rankin: If the Court please, I would like at this time [21] to move the admission, for the purpose of this case, of Mr. Kenneth C. Gillis, an attorney of Oakland, California, admitted to practice in both the State and Federal Courts in the State of California.

The Court: Is that satisfactory to you?

Mr. Stott: Yes, your Honor.

The Court: Very well. Proceed.

THEODORE C. SIBERT

was thereupon produced as a witness on behalf of plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rankin:

Q. What is your name, please?

A. Theodore C. Sibert.

Q. Where do you live, Mr. Sibert?

A. 1139 Sunny Hills Road, Oakland, California.

Q. What is your business?

A. I am President of the Paramount Pest Control Service.

(Testimony of Theodore C. Sibert.)

Q. How long have you been in the pest control service?

A. I first started in 1927, not steady, but I have been pretty close to the pest control service for around twenty years.

Q. When you say "not steady," what else did you do?

A. I am a cement finisher, a carpenter and a plasterer. I served an apprenticeship as carpenter—— [22]

Q. Did you, while you were carrying on these trades, also endeavor to do something in the nature of pest control?

A. I have been associated with pest control since 1927, working part time.

Q. Who was associated with you, if anyone?

A. Mr. Watson T. Moore.

Q. Anyone else?

A. Working for the Western Exterminating Company.

Q. Anyone else?

A. Mr. Charles Brewer and many others.

Q. Concerning your original enterprise, was it a partnership or corporation?

A. Co-partnership.

Q. Who was your partner?

A. Glenn H. Fisher.

Q. How long were you and Mr. Fisher in partnership?

A. November 15, in 1938, we started the Paramount Pest Control Service.

(Testimony of Theodore C. Sibert.)

Q. To when?

A. About July 1st, around July 1st or something, 1946.

Q. What did you do then?

A. We formed a corporation.

Q. Is that corporation the plaintiff in this case, the Paramount Pest Control Service?

A. It is. [23]

Q. When did you come to Oregon?

A. Came to Oregon July 1, 1942.

Q. How did you happen to come to Oregon?

A. Because of the request of the S. P. Railroad Company, handling their business in Oregon.

Q. Had they been a previous client of yours in the State of California? A. Yes.

Q. The Court has indicated he wants us to move along, so will you briefly give a summary or a brief sketch of the pest control business and how you built it up and what it amounts to at the present time?

A. Well, Mr. Fisher and I started the Paramount Pest Control Service November 15, 1938. He had been previously in business for two and a half years by himself. We *didn't enough* work to keep us both going, so I worked with my carpenter tools, my carpenter's trade, daytime, and he solicited on the street, and he done his work right at the office, and we done the work on a Sunday or whenever we could. We worked pretty hard for years.

(Testimony of Theodore C. Sibert.)

We had a new idea. Our idea was this, to formulate the best of chemicals, that is, the best on the market. We had had quite a lot of experience in chemicals before and in servicing and applying them to pests or rats, or whatever we tried to kill.

So, we decided not to sell the chemicals and to service these places, sign this work up, so much for the cleanup the first month and then so much each month thereafter, and this took in a wonderful way. We attained as near 100 per cent as we could in controlling of all disease-carrying pests pertaining to structural. We worked pretty hard.

Q. What do you mean by saying you "worked pretty hard"?

A. That is what I was about to tell you. We worked sixteen and twenty hours a day. There was many weeks I didn't take off my shoes, only to change my socks and wash my feet, and just lay down on the couch.

Q. What ingredients did you use in your business? A. I don't understand the question.

Q. What did you do with pest control? How did you control pests? How did you kill them?

A. Well, we have our own laboratories; we have research and we take chemicals and we formulate them applicable to a certain type of insect or that certain type of rodent, or whatever the problem might be. We train men.

Q. Train them to do what, Mr. Sibert?

A. We train men along the lines of formulating that is necessary, and how to apply that chem-

(Testimony of Theodore C. Sibert.)

ical, that poison that we leave in there, foodstuffs especially, and to have the right amounts in the right containers; and then train them to keep clean and so that they don't do things that they shouldn't on the job. It is quite extensive training. It is very unique. [25]

Mr. Rankin: At this time, your Honor, the witness having testified that they were incorporated, we would like to offer in evidence—and if we can keep these exhibits in the same order, giving them the same numbers, it will aid greatly in many respects.

The Court: Why not put in all the exhibits at once?

Mr. Rankin: That is all right with me, your Honor. Counsel has had them and has looked them over. Have you any objection to any of these exhibits?

Mr. Bernard: There are some exhibits in there that deal with some person's memoranda as to accounts. Of course, we object to those as being hearsay unless they are proved by some witness.

Mr. Rankin: I think that objection would be proper, your Honor. If counsel will point them out——

The Court: No, we will do it like we do in all cases like this. All of the exhibits that have been marked for identification on both sides will be admitted as exhibits in the trial, taking the same numbers and being subject to any objections that

(Testimony of Theodore C. Sibert.)

may heretofore have been made or may hereafter be stated.

(The following Plaintiff's Exhibits were thereupon received in evidence and marked as follows:) [26]

Plaintiff's Exhibit No.	Description
1	Articles of Incorporation of Paramount Pest Control Service.
2	Declaration of Purpose to Engage in Business in Oregon.
3	Certificate of Authority to Engage in Business in the State of Oregon.
4	Receipt for fees, Corporation Department, State of Oregon.
5-1 } to } 5-26 }	Labels—Paramount Pest Control Service.
6-1 } to } 6-7 }	
7	Instructions and Training Given Employees, Paramount Pest Control Service.
8	Rules and Regulations of Paramount Pest Control Service.
9	Rules and Regulations of Paramount Pest Control Service.
10	Safety Rules in Using Compound 1080.
11	Form of Service Order for Paramount Pest Control Service.
12	Form in re service performed.
13	Form of receipt—Paramount Pest Control Service.
14	Duplicate copy of receipt.
15	Application of Charles P. Brewer for Employment.

(Testimony of Theodore C. Sibert.)

Plaintiff's Exhibit No.	Description
16	Employment Application Blank—Carl Robert Duncan.
16-A	Form of Application — Paramount Pest Control Service.
17	Form of Application for Registration of Economic Poisons—State of California.
17-A	Form, Application for Structural Pest Control Operator's License.
18	Form of Application for Structural Pest Control Field Representative's License.
19	Form of Application for Fidelity Insurance, The Fidelity & Casualty Company of New York.
20	Copy of By-Laws for Internal Administration of Structural Pest Control Board.
20-A	Copy of By-Laws for Internal Administration—Structural Pest Control Board.
21	Copy of By-Laws for Internal Administration of Structural Pest Control Board.
21-A	Copy of By-Laws for Internal Administration—Structural Pest Control Board.
22	Time Reports—Carl Duncan.
23	Time Reports—Raymond Rightmire.
24	Copy of Publication "Pest Control and Sanitation," September, 1947.
25	Copy of publication issued by Julius Hyman & Company, Denver, Colorado, "OCTA-KLOR," May, 1947.
26	Copy of publication of Socony-Vacuum Oil Co., "Technical Bulletin," June, 1947.
27	Sales Agent's Agreement with Paramount Pest Control Service and Charles P. Brewer.
28	Bill of Sale from co-partnership to corporation, Paramount Pest Control Service.
29	Copy of letter March 15, 1947, H. W. Hilts to Charles Brewer.

(Testimony of Theodore C. Sibert.)

Plaintiff's Exhibit No.	Description
30	Check dated February 6, 1947, \$338.00, to Paramount Pest Control Service.
31	Supporting Voucher No. 181.
32	Check dated March 6, 1947, \$250.00, to Paramount Pest Control Service.
33	Supporting Voucher No. 229.
34	Check dated March 13, 1947, \$494.25, to Paramount Pest Control Service.
35	Supporting Voucher No. 244.
36	Accounting as of June 30, 1947, between Hilts and Brewer.
37	Check dated July 9, 1947, \$259.61, to Paramount Pest Control Service.
38	Supporting Voucher No. 413.
39	Statement of Accounting on Franchise for July, 1947.
40	Tabulation in re Eastern Oregon Expense.
40-A	Indenture of Lease, The House of Celsi, Lessor, Paramount Pest Control Service by Charles P. Brewer, Lessee.
40-B	Sign entitled "To Our Patrons," Paramount Pest Control Service.
40-C	Sign "Patrons"—Brewer's Pest Control.
42	Letter, July 24, 1947, Charles P. Brewer to T. C. Sibert.
43	Check dated March 3, 1947, \$226.00, to Kelly Motors.
44	Supporting Voucher No. 203.
45	Photostatic copy of Chattel Mortgage executed by Charles P. Brewer, \$1,052.63, to Bank of California N.A.
46	Photostatic copy of Assumed Business Name Certificate, Brewer Pest Control.
47	Photostatic copy of Certificate of Retirement, Brewer's Pest Control.

(Testimony of Theodore C. Sibert.)

Plaintiff's Exhibit No.	Description
48	Photostatic copy of Assumed Business Name Certificate, Brewer's Pest Control.
49	Statement of Accounting on Franchise for January and February, 1947.
50	Statement of Assets taken over by Charles P. Brewer.
51	List of Accounts totaling \$925.89.
51-A	Statement entitled "Eastern Oregon State Run"—Total Revenue, \$1357.00.
53	State of Expense, \$3596.95.
54	File of "Canceled Accounts with Time to Run as Per Contract.
55	File of "List of Accounts on Books" Longer than one year and canceled because of Brewer action.
56	Copy of letter dated October 22, 1947, Attorneys for Paramount Pest Control Service to Charles P. Brewer.
57	Profit & Loss Statement, January 1 through February 28, 1947.
58	Profit & Loss Statement, January 1 through March 31, 1947.
58-A	Profit & Loss Statement, January 1 through March 31, 1947.
59	Balance Statement, January 1 through April 30, 1947.
59-A	Portland Profit & Loss Statement, January 1 through April 30, 1947.
60	Profit & Loss Statement, January 1 through May 31, 1947.
60-A	Balance Statement, May 31, 1947.
61	Balance Statement, June 30, 1947.
61-A	Profit and Loss Statement, January 1 to June 30, 1947.

(Testimony of Theodore C. Sibert.)

Plaintiff's

Exhibit No.

Description

- | | |
|------|--|
| 61-B | Trial Balance, June 30, 1947. |
| 62 | Copy of Complaint in Circuit Court of the State of Oregon, Paramount Pest Control Service v. Charles P. Brewer, et al. |
| 63 | Copy of Notice to Produce in Cause No. 178013, Circuit Court of the State of Oregon. |
| 64 | Check dated September 10, 1947, payable to Conger Printing Co., signed "Brewer's Pest Control." |
| 65 | Check dated October 17, 1947, payable to Conger Printing Co., signed "Brewer's Pest Control." |
| 66 | Check dated October 10, 1947, payable to Conger Printing Co., signed "Brewer's Pest Control." |
| 67 | Form of Receipt—Brewer's Pest Control. |
| 68 | Form to be signed by customer—Brewer's Pest Control. |
| 69 | Business Card, Brewer's Pest Control. |
| 70 | Form of Service Order—Brewer's Pest Control. |
| 71 | Form of Daily Report—Brewer's Pest Control. |
| 72 | Form of Statement—Brewer's Pest Control. |
| 73 | Envelope bearing return address "Brewer's Pest Control" (small size). |
| 74 | Envelope (large size) bearing return address "Brewer's Pest Control." |
| 75 | Letterhead—Brewer's Pest Control. |

Mr. Rankin: Your Honor, the first exhibits relating to the corporation, I anticipate there is no objection to them.

The Court: They are all in.

Q. (By Mr. Rankin): Mr. Sibert, I would like to hand to you Plaintiff's Exhibit No. 5, sub-numbered No. 5-1 to No. 5-26, and ask you to state, after

(Testimony of Theodore C. Sibert.)

having reviewed those, whether they are poisons that are put out by your company, labels of poisons put out by your company?

The Court: You know what they are. You have seen them. Are they covering your material?

A. Yes.

Q. (By Mr. Rankin): Are they poisons put out by your company? A. They are, sir.

Q. Are all of these poisons such as you can buy on the common market? A. No, sir.

Q. How many are there altogether? Twenty-six? A. Twenty-six here, sir. [33]

Q. What proportion of those can you buy on the common market, not under your name but which are common poisons that you can buy?

A. What proportion of these chemicals?

Q. What proportion of these poisons represented by these labels can you buy on the common market?

A. These chemicals are not for sale. They are for use in the service department.

Q. If they contain poisons that are not unique in your business but are common on the market, how many of those are covered by these labels?

A. There is thirty-one poisons which we have registered—there is five that is basic poisons which we have to register.

Q. You say you have to register. Just what do you mean by that?

A. Because of the strict laws, the Economic Poisons License of California. It is a package law,

(Testimony of Theodore C. Sibert.)

sir, and it is the Economic Poisons Law—As long as you are a reliable company and have chemists and the equipment to formulate these poisons and to package them and put your label on and the correct amount of the compound, the amounts in the poisons, the exact amount to the gram of the poisons and the exact amount to the gram of the inert ingredients.

Q. You say there are five basic poisons?

A. Five basic poisons, yes. There are thirty-one poisons that we have registered. [34]

Q. You said that. A. Yes.

Q. Five of them are basic?

A. There are chemicals that you buy that are not basic, what are common poisons, because you can buy those on the market.

Q. As to the other twenty-six you describe, is there anything done by your company in connection with those? A. Yes.

Q. Is what you do unique or different from those that you get on the common market?

A. It is, sir.

Q. Have you any man in your employ who, as a part of his duty, has anything to do in connection with these poisons? A. I have Mr. Bushing.

Q. What is his department in your company?

A. He is an entomologist and chemist, a teacher to teach the men, our men, how to handle poisons, especially how to handle poisons safely.

Q. Does your business require any knowledge as to the pests? A. It does, sir.

(Testimony of Theodore C. Sibert.)

Q. What knowledge do you have to have in order to handle pests?

A. You have to have quite a lot of knowledge because it is like this: One insect, it takes one poison to kill that one insect; and some poisons will not apply to that insect, and you have to know how to identify that insect, so, therefore, we have a [35] school and have an entomologist, and that is the service that you get—something that the boys on the road don't have. He is always there. They send insect specimens in to him and they are correctly identified and the exact formulation is prescribed, just what and how much to use to take care of the insect.

Q. Suppose you gave too much poison, would that still kill the insect?

A. Certain poisons does not kill if you give too much.

Q. To what do you refer, generally?

A. Well, arsenic—too much arsenic will not kill. There are certain poisons in here that are repulsive, that a person could not take—it is repulsive.

Q. Do you know of any other pest control service that has a branch instructing its men?

A. Not on the Coast, sir.

Q. Do you require your employees to have any training?

A. We have to train all employees because of the safety, because in California there is a very strict law. We have the Structural Pest Control Board

(Testimony of Theodore C. Sibert.)

in California, and everybody that works in this industry in California must pass a written examination under the Board, and it makes a profession out of this business.

Q. In what states do you do business?

A. Do business in California, Oregon and Washington and Arizona.

Q. The law of which state or states do you find the most exacting? [36]

A. California.

Q. Have you complied with all the laws of California in respect to your business? A. Yes.

Q. Do you, as a matter of fact, thereby also conform to the requirements of the other states?

A. We run our business according to the laws of California.

Q. Will you look at the set of exhibits that you have before you? A. Yes.

Q. Explain to the Court how those various instruments are used in connection with your business?

A. Exhibit 6?

Q. Just a moment, Mr. Sibert. The exhibit starts with No. 6-1.

A. I have it now, sir. This is literature that is got out by Mr. Bushing.

Q. What it is, please? Just explain how it fits in with your training of your employees?

A. We set these boys right on the correct identification of all pests and those especially what we have the most of, and we formulate the information

(Testimony of Theodore C. Sibert.)

to give to all the men to study so that they can be better men and can identify these pests and insects which they have to work with at all times.

Q. Take Exhibit 6-1. What is that? How does that bear on this matter? A. This is bedbugs.

Q. What about it?

A. Well, it explains the type of injury that would result from the bite of a bedbug and what diseases it carries when it bites.

Q. What do you do with that pamphlet that gives that information?

A. We mimeograph these off and give them to all men that works for us.

Q. Take No. 6-2, "White-Footed Mice."

A. This is instruction on a very uncommon mouse and information that the boys should need. It gives identification and gives all measures to handle this certain type of mouse.

Q. You mean, to identify the mouse so that it can be killed? A. That is right.

Q. Take No. 6-3.

A. Clothes moths, the importance and type of injury, food of the moth, and giving the chemicals that should be used and the type of inert ingredients, history and habits, and then control measures, and we explain exactly what should be done.

Q. What do you mean by "inert ingredients"?

A. Inert ingredients is to carry all the poisons, to formulate certain poisons together so that they will be compounded to give a certain type of poison

(Testimony of Theodore C. Sibert.)

that will do a certain job, to take care of that certain type of rodent or that certain type of insect.

Q. Are inert ingredients themselves poisons, necessarily? A. Not necessarily.

Q. When your labels mention active and inert ingredients, what [38] are the active ingredients, generally speaking?

A. They are the poisons that is found. These poisons, every one of them, is inspected once a year by the Economic Poisons License Department. They come right out to the boys on the job and they take take them out of the can. These poisons must be labeled. They take a certain portion of a certain specimen once a year to see that these poisons are exactly as on the label.

Q. Do you have to show the content of all these poisons on the labels? A. We do.

Q. Do you have to show what the inert ingredients are? A. No.

Q. How do you find out what inert ingredient to use?

A. We have to experiment as to what inert ingredients to use.

Q. These articles or papers you are mentioning here, under this Exhibit 6-1 to 6-7, are they given to the employees for their instruction and use and training, such as you have already stated?

A. They are, sir.

Q. Take Exhibit No. 6-4, "Carpet Beetles or Buffalo Beetles."

(Testimony of Theodore C. Sibert.)

A. It has to do with the importance and type of injury. If you were not trained, you wouldn't know the difference between clothes moths and these. It is entirely different. They have an entirely different chemical, an entirely different application to take care of them. This explains the food and distribution, and how they [39] come and where they are found. They are found different places, and they hibernate. This shows the life history, appearance and habits, and of course the control measures, how to take care of them and what chemicals to use.

Q. Take Exhibit 6-5. A. Yes.

Q. What is that?

A. That is what we call the "Bug House Questionnaire."

Q. Does that apply to the bug itself or what?

A. This applies to the man after he is taught and goes to school. He is sent this "Bug House Questionnaire" containing true and false questions to see and get his IQ to see what he is getting out of his studies.

Q. Suppose he does not answer the questions properly?

A. Then we go to his superior, whoever he is working for, and see what is wrong.

Q. Suppose he answers them excellently, what happens then?

A. Then that is in his favor.

Q. What happens? Does he get any work because of that?

(Testimony of Theodore C. Sibert.)

A. We don't have priorities. It is the man that knows how to do the job and knows exactly what is best for his job, he goes forward best.

Q. What about Exhibit 6-6?

A. That is another "Bug House Questionnaire" covering rats and mice, bedbugs, silverfish and fleas, carpet beetles, moths and [40] ants.

Q. Silverfish, what is that?

A. Silverfish is an insect.

Q. Is that of the same nature of a questionnaire as we just got through with?

A. This is the same nature of a questionnaire.

Q. Take Exhibit 7. A. 6-7?

Q. Yes. What is 6-7?

A. This is a report of sodium fluoroacetate baiting. This poison is very dangerous itself, so dangerous itself that there is no known antidote. It is very hard to get. No company can buy it without they are an established company. These are poisons that whenever a man uses them in training, or otherwise, he has to fill out one of these reports as to where he puts his bait, and then keep a complete account of that bait, of that poison.

Q. You say you can't buy it, that not everyone can buy that?

A. The company that makes this certain chemical insists that you are an established company and have quite a large liability insurance. They don't undertake the liability themselves.

Q. When you say "quite large," what do you mean by that? A. At least 40 and 80.

(Testimony of Theodore C. Sibert.)

Q. What do you mean?

A. If one person gets injured, \$40,000; if there is a bunch of [41] them, they divide the \$80,000.

Q. You have to furnish a bond before you can buy it?

A. There is a bond that you have to have.

Q. Are there many companies that manufacture that kind of poison?

A. There is only one company that manufactures this poison.

Q. Why? Is their supply abundant or not?

A. Very limited.

Q. Take a concern that was just starting in, perfectly new, could they go out and purchase it?

A. Well, they would have to furnish their bond. I don't know, but it would be very hard if they did.

Q. Take Exhibit No. 7.

A. That is Rules and Regulations of the Paramount Pest Control Service. When a man comes to work for us, we talk to him quite a while and we hand him the Rules and Regulations to read. This has to do with how to keep clean and how to handle your kits and how to protect themselves. A man must understand he has to be careful, and he has to use the things we furnish him.

Q. Is that signed? A. It is signed.

Q. It is signed by whom?

A. Signed by Rightmire, Raymond L. Rightmire.

(Testimony of Theodore C. Sibert.)

Q. Look at Exhibit No. 8, please.

A. This is another copy of Rules and Regulations.

Q. Is that signed? [42] A. Yes.

Q. Whom is that signed by?

A. Carl Duncan.

Q. Look at Exhibit No. 9.

A. That is another copy of Rules and Regulations.

Q. How does it relate to the others?

A. Every once in a while we have to change these; change them a little bit. This is a new one.

Q. Look at Exhibit No. 10.

A. Safety Rules in Using Compound 1080.

Q. What is Compound 1080?

A. Sodium fluoroacetate.

Q. Is it dangerous or not?

A. Very dangerous. These are the safety rules in using it. It tells just exactly what it is, where it comes from, the lethal dose. No employees are allowed—they are not even allowed to dilute it. We do not allow them to handle it. It is told here just exactly what they have to do.

Q. Do you have rules relating to the service of the employees and how they should serve your company for their own protection and for sanitation and so forth? A. We do.

Q. See if Exhibit No. 11 has any bearing on this?

A. Exhibit No. 11 is the general service order, or our contract.

(Testimony of Theodore C. Sibert.)

Q. That is Form 7, I believe. How do you handle that? [43] A. Form 7. This is Form 7.

Q. Well, I don't care about the form number. It is Exhibit 11 and it is called "Service Order."

A. Yes.

Q. How do you handle that? Just explain to the Court what function it has in your business?

A. This is a general service order which it takes a licensed man in the State of California to carry. California does not allow you to identify pests without you have a license in that state to do that job.

Q. Did Mr. Brewer have any license in California? A. He did not.

Q. Go ahead.

A. This is for general pest control. It has the name and address, the service, the type of property and the order number, the time of starting and who you see, and it has most of the pests that we have in general, and the date and price and conditions, and the length of the contract.

Q. When do you get that?

A. We get this before we start to work on the job.

Q. Whom is it signed by?

A. It is signed by an official salesman or usually the branch manager in the district.

Q. Anyone else?

A. It is also signed by the customer. [44]

Q. Is that a contract between you and the customer, is that what you mean? A. It is, sir.

(Testimony of Theodore C. Sibert.)

Q. Exhibit No. 11 is what?

A. It is a service order.

Q. What is the next exhibit?

A. It gives——

Q. Pardon?

A. It gives the name, address, remarks, and space for the condition of the job, signed by the operator and the customer.

Q. What is the next exhibit?

A. Receipt, in duplicate. When one of our servicemen has to collect money, he gives a duplicate receipt. These are numbered and he must account for the numbers.

Q. Whom does the duplicate go to?

A. The duplicate goes to the owner and he brings the other in with the money, the cash.

Q. How about Exhibit No. 15? Does that have any bearing on your business?

A. This is an application blank.

Q. When do you require applications?

A. When a man comes in to ask us for work, if we are interested or think he would make an operator, we ask him to fill out an application blank. Then we more or less investigate and talk it over and when we need a man we pull these application blanks out, [45] and the one we want we call in, or get them in and give them a chance to work for us.

Q. Do you know whose application blank that is?

A. I do. This is Charles Brewer, Charles P. Brewer.

(Testimony of Theodore C. Sibert.)

Q. Does that application state whether he had any previous experience in pest control or not?

A. It does. He had no previous experience.

Q. So far as you now, either from this application or otherwise, had Charles P. Brewer any experience or service or training in pest control prior to the time he came to work for the Paramount Pest Control Service?

A. His application says none.

Q. What is Exhibit No. 16? A. 16?

Q. Yes.

A. That is another application blank.

Q. Is it like the other one or more recent in form?

A. No, it is a little later one. This is an earlier one.

Q. What is No. 17?

A. This is No. 16 is filled out.

Q. What is No. 17?

A. It is an application blank.

Q. An application blank? A. Yes.

Q. What is No. 17? [46]

A. You misunderstood me, Counsellor. 17 is the blank one. 16 is filled out.

Q. What is 17?

A. It is the latest application form we have.

Q. For what purpose?

A. When a man comes to work for us, or we are interested in him, we will have him fill an application form out.

(Testimony of Theodore C. Sibert.)

Q. Isn't that for the registration of poisons?

A. No, sir.

Q. Isn't it?

A. Yes; I am sorry, sir, it is. I had the wrong one.

Q. Yes.

A. No. 17 is an "Application for Registration of Economic Poisons," under the Department of Agriculture in California.

Q. Explain why that is required, if it is, and what is done with it?

A. This controls the packaging laws of the State of California. It controls any poisons that is packaged. It has to be registered in the correct formula, with the amounts of poisons, and the skull and crossbones on it, and the antidote, and the date and address where they are packaged and put into the formulation and sealed, sir.

Q. Referring back to that series of exhibits numbered 5-1 to 5-26, relating to your labels, is there any particular designation on those relating to your products? [47]

A. These are all products that we have formulated.

Q. Get my question. Is there any particular designation on them?

A. This is a license, an application to register.

Q. No. I am not talking about that now, Mr. Sibert. I am calling your attention again to the labels in Exhibit No. 5-1 to No. 5-26. Is there any

(Testimony of Theodore C. Sibert.)

particular designation on those labels relating particularly to your products?

A. These are all our products, every one of them labels.

Q. Is there any particular designation on them relating to your products? What about that man on there?

A. This man is our trade-mark.

Q. What is it there? What does it say?

A. "Doc Kilzum, his patients all die."

Q. Is that your trade-mark?

A. That is our trade-mark.

Q. That is what you put out?

A. That is right.

Q. Going back to Exhibit No. 17-A, what does that relate to?

A. This is an application for Structural Pest Control Operator's License.

Q. How is that required and what do you do under it?

A. Under this application you are—the law says you must be in the pest control business in California at least one year before you are allowed to apply for the operator's license of [48] California. This is the written examination under the State Board of Structural Pest Control of California.

Q. What is No. 18?

A. "Structural Pest Control Field Representative's License."

Q. What is the difference between the field representative's and the operator's license?

(Testimony of Theodore C. Sibert.)

A. This field representative is a worker or serviceman.

Q. What is No. 19?

A. Application for a bond, Fidelity and Casualty Company of New York.

Q. Do you procure bonds on employees?

A. After a man goes to work for me, he fills this application out and we procure the bond.

Q. Is that required?

A. That is required of every employee.

Q. What is No. 20?

A. By-laws of the Structural Pest Control Board, instructions to applicants for a field representative's license, how to apply, and the conditions of study.

Q. What is the Structural Pest Control Board?

A. The Structural Pest Control Board is elected direct by the Governor of the State.

Q. Elected? You mean appointed?

A. They are appointed, yes, as a rule.

Q. Yes. [49]

A. They are appointed in judgment over the businessmen of the structural pest control in California, to see that they live up to the regulations and rules which they set forth.

Q. Is it limited to the State of California?

A. That is limited to the State of California.

Q. This particular instrument, Exhibit 20, what is that?

A. This is instructions to applicants for a field representative's license?

(Testimony of Theodore C. Sibert.)

Q. Then a field representative, as I understand it, is not only under your direction but under the direction of the Board? A. That is right.

Q. No. 20-A, what is that?

A. This is the same, only different; instructions to applicants for an operator's license. I mean for an operator, not a field representative's. Sorry. This is sent from the State Board of California to the operator with instructions.

Q. What about No. 21?

A. This relates to the examination and the details of—it says "Bylaws for the Internal Administration of the Structural Pest Control Board."

Q. What measure do you take, Mr. Sibert, when you have employed a man who is qualified in all these respects to serve the company in the pest control service, to keep track of what he is doing?

A. I don't quite understand your question.

Q. Say that you have a man in your service now. He is qualified, [50] otherwise. How do you keep track of him after you get him employed?

A. We have our service slips that they turn in every day, a time sheet showing what work they did for that day.

Q. Will you examine the next exhibit, No. 22, and see if that has anything to do with the matter?

A. Time reports. We have time reports. We know where every man is and wherever he works that day, by our system we have in the office.

Q. Whose time report is that?

A. Carl Duncan's.

(Testimony of Theodore C. Sibert.)

Q. Covering what particular time?

A. The week ending May 11, 1946.

Q. How many sheets are in that exhibit relating to Carl Duncan? A. Eleven—ten.

Q. Where do those sheets show that he did that work? A. In Portland.

Q. What was he doing in Portland, Oregon, in May, 1946?

A. Instructing Charlie Brewer and his men, breaking them in to show them how we have safety laws, breaking them in to the extermination field.

Q. Why was that necessary with respect to Charlie Brewer?

A. When he was sent up here, he wanted to keep an instructor here to help him.

Q. Do I understand you that he had not completed a sufficient [51] course to know what to do up here? A. That is right.

Q. How long did he continue under your instructions?

A. Mr. Carl Duncan was in the employ of Charlie Brewer, as of the letter of the 24th.

Q. The 24th? A. Of June—July.

Q. What year? A. 1947.

Q. You mean by that he was continuously under the instruction of Carl Duncan?

A. So far as working up here was concerned. Carl Duncan was our field instructor.

Q. Was Brewer continuously under his instruction? A. That is right.

Q. What is Exhibit No. 23?

(Testimony of Theodore C. Sibert.)

A. It is the time slips for Raymond Rightmire.

Q. Located where?

A. Portland, Oregon.

Q. What was Rightmire doing here?

A. He is a serviceman.

Q. What do you mean by "serviceman"? What did he do?

A. Service; puts out poisons and takes care of our instructions, how to do certain things.

Q. State whether or not, after having trained these men, you [52] make any effort to keep them abreast of the times on any products?

A. Yes. We get all the literature we can that is put out. Mr. Bushing has contacts and that literature is sent out to him—sent out to the field men by the branch manager or franchise manager.

Q. Look at Exhibit 24 and state what that is?

A. This is an authorized magazine, I know. It is wonderful information that is in these magazines for a pest control operator.

Q. What is the name of that?

A. "Pest Control and Sanitation, Home and Garden."

Q. Is that provided to employees?

A. We buy this magazine and send it to the branches, so the employees can have it.

Q. Look at Exhibit No. 25.

A. This is also the same information from Hyman & Company, Denver.

Q. Relating to what?

A. Insect information.

(Testimony of Theodore C. Sibert.)

Q. Was that also provided for the employees?

A. It is.

Q. Is it a good publication?

A. It is a good publication.

Q. What is No. 26? [53]

A. The same material. That is something new in the field; spray barns for flies. It is a very good publication.

Q. Now, Mr. Sibert, have you in general, without going into great detail, covered your pest control business, beginning with the training of the employees and what is done to keep them acquainted with the progress of pest control, in general? In general, have you covered that?

A. I believe I have, in general, sir.

Q. How long have you known Charles P. Brewer?

A. I believe in October, 1945.

Q. What was the occasion of your meeting him?

A. I met him in a home in Oakland, California.

Q. Did you subsequently come to be associated with him in business?

A. Yes.

Q. How did that occur, and when did it occur?

A. Mr. Brewer came into my office the first of the year, 1946, and asked for a possible opening up in the northern country. He said he was born in Spokane and would like to come up here, in this part of the country.

Q. What did you do?

A. I took his application and told him if anything came up we would let him know.

Q. Is that Exhibit 15 that you have already

(Testimony of Theodore C. Sibert.)

mentioned? A. That is his application, sir.

Q. What then happened after you took his application in January?

A. There was an opening come up and he happened to come in just about the time there was an opening come up in Portland.

Q. When did he start training for the Paramount Pest Control Service?

A. February 4, 1946.

Q. How long did he train?

A. He come up while he was still in training.

Q. Did he subsequently come to the Northwest?

A. He come to the Northwest around April 1st.

Q. Whom was he serving at that time? In whose employ was he?

A. In the Paramount Pest Control Service.

Q. What was it at that time?

A. A co-partnership.

Q. A co-partnership of Fisher and yourself?

A. That is right.

Q. How long did that continue?

A. To the first of July.

Q. What happened then?

A. He started on a franchise basis, 80-20, sir.

Q. Now, it is claimed by the defendant, Brewer, in this case, and stated to the Court in opposing counsel's opening statement, that he was practically compelled to accept this franchise agreement of July 1, 1946. State whether or not Mr. Brewer had [55] signed the franchise agreement prior to that time?

(Testimony of Theodore C. Sibert.)

A. Mr. Brewer, before he came to work for us, was hired specifically for this job; we showed him the basis on which we worked men in this country; we gave him the exact terms which he signed and was working under and he took them home, and he knew exactly the basis—in fact, he made us promise before he came up here just what basis he would work on, and we kept our word.

Q. Did he sign any instrument at the time he came up here in April? A. He did.

Q. What was that?

A. That was a branch manager agreement.

Q. Did he read it before he signed it?

A. He did.

Q. When it came to the franchise—you call it a franchise. When he made his sales agent's agreement of July 1, 1946, when did Mr. Brewer get a copy of that? Can you give the date and time?

A. Yes.

Q. When was it?

A. He got a copy of that two days before he come to work for us and took it home. You mean of this specific—he got a copy of the exact——

Q. That does not mean anything. [56]

A. The difference is it is blank.

Q. You say it is blank?

A. No. The district in which he works and his boundary lines, exactly the same.

Q. Otherwise the form you gave him was exactly the same as the executed franchise?

A. It is, sir.

(Testimony of Theodore C. Sibert.)

Q. When did he get that form?

A. Two days before he came to work. That would be February 2nd. You mean this form in front of us?

Q. Yes.

A. This form, he got that the first of July.

Q. When did he get that form so that he could know the contents of this exhibit?

A. He had it two days before he came to work, which would be February 2nd.

Q. Then, do I understand you correctly that you say he knew of this franchise form from February, 1946, to July, 1946?

A. Yes, sir.

Q. Did he ever ask you any questions about it?

A. No, sir. Excuse me. Correction, sir. We had talked it over as to the things about it and he asked questions at that time before he went to work for us.

Q. Before he went to work?

A. Yes. [57]

Q. At the time he signed this exhibit, No. 7, the sales agent's franchise, did he know the contents of it?

A. They were explained to him, yes, sir.

Q. Do you recall where Mr. Brewer signed that agreement.

A. Signed that agreement in Portland.

Q. Where was it signed by Mr. Fisher?

A. In Oakland.

Q. Has that agreement been recognized by the parties since it was signed?

A. It has.

(Testimony of Theodore C. Sibert.)

Q. After July 1, 1946, how long was it before the instrument was actually signed, do you know, by both parties?

A. Mr. Brewer signed this, I think, before July 1st and Mr. Fisher, and then it was mailed out to me. I was not in the office and Mr. Fisher sent it out around the first of July, and it was sent back to him.

Q. How long was that agreement in that form lived up to by the parties? Was any change ever made in that agreement?

A. Only change of payment.

Q. Relating to what paragraph of that instrument? A. 5.

Q. Paragraph 5. What was the change made at that time in Paragraph 5 in the matter of payment?

A. The agreement by Mr. Brewer and myself on September 12th.

Q. What year? [58]

A. 1946, in the breakfast room. An agreement——

Q. Whereabouts? A. At his home.

Q. Whereabouts? A. In Portland, sir.

Q. Portland, Oregon? A. Yes.

Q. What was the agreement and why did you make it?

A. Our visit with them was very friendly. Of course, I guess that is immaterial. Mr. Brewer had a plan and that was an extension plan. He gave me a list of potential business that he could sign

(Testimony of Theodore C. Sibert.)

up and he expressed himself as to the cost of the signing up of new business, which is true.

In other words, he told me if he could afford it he could sign up enough monthly business to bring the present business up to \$3,000 monthly basis in Portland. Then he brought up the amount of money which he had drawn as a drawing account, and I expressed myself in this manner, that I appreciated a man that wanted to expand the business and I didn't want to make any hardship on him, and if he had taken so little home a month that I would match that dollar for dollar and that would give him a surplus to take care of this expansion of business which he said he had in mind.

That was merely a verbal agreement and that was supposed to be—We talked that we would go back from July 1st, [59] 1946, and end January 1st or December 31st.

Q. December 31st of what year?

A. 1946.

Q. You say that you expressed yourself. Was that said to Mr. Brewer?

A. That always has been said.

Q. Was this said to Mr. Brewer?

A. It was said, yes.

Q. Did you, thereafter, go on that basis for the period of time from July 1, 1946, to December 31, 1946?

A. We did.

Q. And it was on your personal responsibility that you did that?

(Testimony of Theodore C. Sibert.)

A. Yes—No, sir. I have to report to the Board.

Q. Did you do so? A. I did, sir.

Q. When? A. In December.

Q. This occurred when; this conversation with Brewer occurred when? A. September 12th.

Q. And you reported it to the Board in December? A. In December.

Q. Why didn't you do it before?

A. It slipped my mind.

Q. When you did report, to whom did you report? [60]

A. To Mr. Fisher and Mr. Hilts.

Q. Was it satisfactory? A. It was.

Q. Now, there is a claim on the record by Mr. Brewer that this adjustment was on the basis of a division of the profits. Was that agreement ever made? A. Never.

Q. He claims it was made about Thanksgiving time in November—November, 1946. Was any agreement of that kind made in November, about Thanksgiving time in November, 1946, or at any other time? A. No, sir, there wasn't.

Q. Did you see Mr. Brewer in November?

A. I did, sir.

Q. Where?

A. He come down from Portland to visit and to relax, he said.

Q. Where did you see him?

A. At my home.

Q. Anyone with him? A. His wife.

(Testimony of Theodore C. Sibert.)

Q. How long did they stay at your home in November? A. Ten days.

Q. Was there any feeling—Or, what was the attitude between you and the Brewers, your family and the Brewer family at that time?

A. Very close, sir. We had a good time; no disturbance whatever. [61]

Q. Was there any mention of business?

A. Oh, no, no mention much of business; just expansion and, of course, there was talk at that time about certain men he had in his employ, but that is all, little short talks.

Q. He states in one place that he went to the office and complained to you that he could not get along on the basis that you allocated to him. Was there any such a thing as that? A. No, sir.

Q. Did he come to the office at all?

A. He did, for a little while.

Q. For what purpose?

A. To pick up chemicals to bring back.

Q. After you talked to Mr. Brewer in November, when did you again see him?

A. January 20th.

Q. What year? A. 1947.

Q. Where?

A. In the office, at Portland, and also at his home.

Q. Did you stay at his home then?

A. Yes, that night I stayed at his home.

Q. Was there anything said or done in connection with either the agreement—By the “agree-

(Testimony of Theodore C. Sibert.)

ment" I mean the franchise—as of July 1st or the dollar-home dollar-company agreement of September 12th, 1946? [62]

A. It wasn't mentioned, sir.

Q. What, if anything, relating to this business did you discuss on January 20th?

A. Mr. Brewer expressed himself about the Eastern Oregon run. He had the complete total of miles, the cost of operation, the long distances between stops, so to speak, and expressed himself that it was costing a lot of money to run the Eastern Oregon run. He asked me what we could do about it and we went into a separate deal. He needed help; he was up here by himself; he needed help to come in and help him, so I agreed that I would go back to Oakland and would send the accounts that we had in Eastern Oregon and I would take a salesman and a company serviceman——

Q. When you say "I", whom are you referring to?

A. We.

Q. To your company?

A. I refer to our company.

Q. Yes. All right.

A. This would take a salesman and a company serviceman, and we were to run that Eastern Oregon run, take a whole month for it; we would start in the south and come up to Portland and take a whole month and work.

Q. Whereabouts in the south?

A. Start at Klamath Falls.

Q. Yes.

(Testimony of Theodore C. Sibert.)

A. And work right straight around the route, to build up a [63] route and then, if it wasn't built up in one month's time, to make the trip back, and then go back home to Portland. We agreed to the payments and the cost of this investigation; with the men on the payroll of Oakland we would continue to leave them on the payroll, and keep a separate and complete accounting of all costs, hotel bills and expenses and, at the end of the venture, if there was anything made in the venture, the Oakland office and the Portland office would divide that dollar for dollar. If there was anything lost, the Oakland office would take their dollar loss and the Portland office would take their dollar loss.

Q. When you say "Portland office", do you mean yourself or do you mean Mr. Brewer?

A. Brewer.

Q. When you speak of the Portland office you are referring to Brewer, the agent?

A. He was the agent.

Q. What was done in the matter of expenses and salaries of these men?

A. We paid all or most of the salaries. There was a little that Mr. Brewer paid, but we paid practically all the salaries and expenses.

Q. What was the agreement with respect to salaries and expenses?

A. Well, we would make an accounting of it and we would pay the salaries of the men.

(Testimony of Theodore C. Sibert.)

Q. You mean your company would pay the salaries? [64]

A. Yes. Our company would pay the salaries and expenses and finance the trip and divide the remuneration out of it and we would split the costs—we would split the remuneration or the loss.

Q. I will repeat this by way of summary to see if I have got you correctly. The expenses of this trip, including costs and salaries, were to be divided equally between Brewer and your company?

A. Yes.

Q. If there was a loss, it was so shared, is that right?

A. Yes.

Q. And if there was a profit, it was so shared?

A. Yes.

Q. Do you know how it turned out, whether there was a loss or a profit?

A. There was a loss.

Q. Has Mr. Brewer ever paid any portion of that?

A. No, sir.

Q. I presume you went ahead and carried out this separate agreement that you have described? That was done by the parties, was it?

A. Yes.

Q. Whom did you send out from the Oakland office?

A. DeGrey Brooks and Jack Ahern.

Q. When, after January 20, 1947, did you again see Mr. Brewer? [65]

A. When did I, after the January trip?

Q. Yes.

A. March 29th.

Q. What was the occasion then?

A. Our regular trip up here.

(Testimony of Theodore C. Sibert.)

Q. Anything said or done at that time in relation to this business that bears on this case, that you can recall?

A. You mean our agreement of September 12th?

Q. Was that discussed then? A. No, sir.

Q. Did your discussion at that time bear on any matters here at all? A. No, sir.

Q. What did you discuss, generally?

A. Just things in general.

Q. When, after March, did you again see Mr. Brewer? A. June 22nd.

Q. Where? A. June 17th. Correction.

Q. Where? A. In Portland, Oregon.

Q. Who was present?

A. Mr. Hilts, myself and Mr. Brewer.

Q. Who is Mr. Hilts?

A. One of our associates, our auditor. [66]

Q. What was discussed at that time with Mr. Brewer present?

A. Things in general was discussed. There was two or three outstanding things. Mr. Hilts made the audit of the books and then we made a budget, which I always had when I came in it, to find out how much business I done and how much it cost and, naturally, being president of this concern, I like to see everybody make a profit.

Q. Go ahead.

A. Mr. Brewer, Mr. Hilts and myself went over his books. We took a recap of the cost of each man that he had working for him, the payroll, the expenses, the car allowance, also the rent, telephone

(Testimony of Theodore C. Sibert.)

charges, advertising, his expenses, and allowed \$150 for an office girl.

We deducted that from the amount of business done in May, added 20 per cent as of the 80-20 agreement, and it came out that Mr. Brewer's part would be \$855.

Everything was very congenial. Mr. Brewer expressed himself that he couldn't afford to stay on the dollar-for-dollar agreement.

Q. Why?

A. Because the budget showed that he could make more money on the 80-20 agreement, as in the franchise.

Q. Was there any \$3,000 figure in there?

A. Well, that had ended my verbal agreement as of September 12th, although I didn't bring that up or didn't bother him. Mr. Brewer's [67] agreement was that if we would match the few dollars he would take home he could have the business built up by the first of the year, up to \$3,000, and it never occurred, but that was the basis. It showed a balance—it showed that Mr. Brewer had done \$3,000.

Q. When did that show?

A. The last of May.

Q. 1947?

A. 1947, yes.

Q. Was that taken into consideration in your budget?

A. Yes. That wasn't in our verbal agreement, although I didn't press anything.

(Testimony of Theodore C. Sibert.)

Q. Do you mean that the verbal agreement of September 12, 1946, ran clear through to May?

A. The agreement——

Q. Did it or didn't it run clear through to May?

A. We allowed it to run clear through to May.

Q. When did you make that agreement? In other words, I don't think you understand me. When you made the agreement of September 12, 1946, did that agreement run clear through to May of 1947? A. No.

Q. When did it run to?

A. It ran from July 1, 1946, to January, or December 31, 1946.

Q. What did you mean by saying that the verbal agreement was [68] taken cognizance of?

A. As I remember our agreement, Mr. Brewer went back on the 80-20 in January or possibly February.

Q. That does not answer my question. What bearing did it have on May, 1947?

A. May, 1947, we, ourselves, because of this Eastern Oregon expense and loss, put the Portland office back on the dollar-for-dollar.

Q. When did you do that? A. May 15th.

Q. Did you see Brewer at that time?

A. No, sir.

Q. By whom was that agreed to?

A. In conference with Mr. Hilts and myself.

Q. Was Mr. Brewer present? A. No, sir.

(Testimony of Theodore C. Sibert.)

Q. Was it at his solicitation? A. No, sir.

Q. How was he notified of it?

A. By letter.

Q. What was the date of that letter?

A. May 15th.

Q. March 15th, isn't it?

A. March 15th. As I recollect, March 15th.

Q. March 15th? [69] A. Yes.

Q. When you have been saying "May" all the way through, that was in error?

A. That is right, Counsel.

Q. I want you to refer to Exhibit No. 29 and ascertain if that is the letter you have reference to?

A. It is.

Q. What is the date of that letter?

A. March 15, 1947.

Q. Do you wish to correct your testimony to conform to March rather than May?

A. I was confused. I wish to correct my testimony.

Q. Going back to this conference in June, state what you did with respect to the adjustment, if any, of profits over the period from January 1st to June 30, 1947?

A. Mr. Hilts had been north and had received word that the Eastern Oregon venture, which I mentioned before, that separate deal, was getting bad; he had got reports from Mr. Brewer, so we had a meeting, and Mr. Hilts had not very definitely understood the deal that Brewer and we made; he heard about it but he didn't understand

(Testimony of Theodore C. Sibert.)

it. That was the first meeting we had had with Mr. Hilts; he had been out of town and it was the first time we had gotten together for quite awhile.

We figured, as to Eastern Oregon at the time, on putting in this new work to make the Eastern Oregon district pay, [71] that it would be nice to show Brewer that we were not a company that would demand everything, you know, but would help him and cooperate with him, so we, ourselves, although he had paid his January and February franchise on the 80-20 basis, as per agreement, we thought it would be nice to show that we were trying to work with him and not take advantage of him, and that we would go back on the dollar-per-dollar agreement, and that is what we tried to explain in this letter.

Q. What letter are you referring to?

A. Exhibit 29, your Exhibit 29.

Q. That is the March 15th letter?

A. The March 15th letter.

Q. All you have said has been relating to a matter in March, 1947? A. Yes.

Q. What my question asked for was in June.

A. Oh.

Q. I think you still have the dates and the times confused, Mr. Sibert. A. I am sorry.

Q. It is all right. As I understand, all you have said shows why you wrote the letter, why the letter of March 15th was written by Hilts to Brewer?

A. Yes.

(Testimony of Theodore C. Sibert.)

Q. Calling your attention to June of 1947, not March but June—— [71] A. Yes.

Q. Did you have an accounting with Mr. Brewer in June? A. Yes.

Q. Who was present?

A. Mr. Hilts, myself and Mr. Brewer.

Q. Did Mr. Hilts compile a statement at that time of the financial obligations between Brewer and the company? A. Yes.

Q. Do you know whether or not it was discussed with Mr. Brewer? A. It was.

Q. Do you know whether or not it was agreed to by Mr. Brewer? It was.

Q. How do you know? A. I was there.

Q. Any other reason?

A. Well, I was there and heard it, and that was the time we made the budget that I was talking about.

Q. Did Mr. Brewer make any payment at that time? A. No. We asked for it.

The Court: Recess until one-thirty.

(Recess to one-thirty p.m.) [72]

(Court reconvened at one-thirty o'clock p.m., January 20, 1948.)

Direct Examination

(Continued)

By Mr. Rankin:

Q. I think when we closed our morning session, Mr. Sibert, I was directing your attention to June 20th, the conversation between Mr. Hilts, Mr.

(Testimony of Theodore C. Sibert.)

Brewer and yourself, and you had testified concerning the March 15th arrangement.

Now, again directing your attention to June 20th—I have called it June 20th; I think the exhibit was dated June 20th; but when was your visit here?

A. I came up on June 17th.

Q. You came up here on June 17th?

A. Yes.

Q. Whenever we designate that conference, whether it was June 17th or 20th, we are talking about the time when you, Hilts and Brewer conferred on the amount that was due to Paramount from Brewer.

A. That is, 1947?

Q. June 17th to 20th, 1947.

A. Yes.

Q. So that we will have this clear, it is not related to the March conference. Will you state where you met in this June 17th conference?

A. In the Paramount Pest Control office of Portland. [73]

Q. Where is that office located?

A. Southwest Park.

Q. Was there an office there before Mr. Brewer took charge?

A. Our office down there, yes.

Q. Where was that?

A. In Mr. Taylor's home.

Q. In this June 17th conference, who was present?

A. Mr. Hilts, myself and Mr. Brewer.

Q. What was discussed in relation to this business at that time?

A. There was a recap made of his business, a recap made of his business, as of May, the end of

(Testimony of Theodore C. Sibert.)

May. Mr. Hilts took the figures off the books, and then we three made a recap, a budget—we took the wages of each man, took the expenses, the chemicals used, gasoline, auto expense, rent, advertising, phone, all things pertaining to the business, as far as costs was concerned. Then we took 20 per cent of the gross business done, deducted that from the business in May and there was \$855 left for Mr. Brewer.

Q. How much did you get?

A. Six hundred—20 per cent.

Q. You do not mean 20 per cent of \$855? \$855 and \$600 made a total of so much. Is that what you mean, something like that? A. No.

Q. Tell me this: Did Mr. Hilts, as your auditor, make a detailed accounting? [74]

A. This budget, you mean? That was done by Mr. Hilts, myself and Mr. Brewer.

Q. Then was there a statement made as to how much Mr. Brewer owed the company?

A. There was.

Q. Who compiled that statement?

A. Mr. Hilts and Mr. Brewer.

Q. What was the nature of the conversation as to whether or not it was friendly or disagreeable, in any feature? A. It was very friendly.

Q. Did Mr. Brewer have any criticism or objection to anything that was done by the company?

A. No; very friendly.

Q. The record shows that he claims to have told you at that time that unless you carried on with

(Testimony of Theodore C. Sibert.)

the contract he had in mind, he was going—he was quitting you. Was anything said by Mr. Brewer about his leaving Paramount Pest Control Service?

A. Nothing whatsoever.

Q. You say in your testimony that the relationship was friendly. On what do you base that statement?

A. Well, when we made this budget, we agreed at that time to extend the dollar-for-dollar deal to the end of the fiscal year.

Q. That was when?

A. That would have been June 30th, and then go back on the [75] regular franchise, which was the 80-20 payment.

Q. Did Mr. Brewer know that?

A. This was his suggestion.

Q. How do you mean it was his suggestion?

A. Well, he stated that he could make more money according to the budget on the 80-20 payment than he could on the dollar-for-dollar.

Q. Could he?

A. Yes. It, I think, was understood.

Q. Will you state whether or not that was understood, that he wanted to go back on the franchise?

A. It was understood.

Q. Was there anything in your relations, other than what you have described, that disclosed their friendliness?

A. Well, Mrs. Brewer was down south. 'She left before I arrived in Portland. It was his little girl's birthday, and I suggested, before I left Seat-

(Testimony of Theodore C. Sibert.)

tle, that if we could get plane reservations, that he and the little girl go back with me as our guests for the little girl's birthday present.

When we got to Seattle—We tried to get reservations in Portland. They were received in Seattle. I called him from Seattle and told him I had the reservations and was going to Spokane, and I got his reservation and the little girl's reservation and made a reservation on the same plane. The plane stopped in Portland. I got off, got his tickets, and we went [76] to San Francisco.

Q. Did the little girl go with you?

A. She did.

Q. Did you meet Mrs. Brewer or not?

A. Mrs. Brewer, her sister and my wife met us at the airport in San Francisco.

Q. Where did they stay?

A. They went home that night with Mrs. Brewers' sister and then came over to my place.

Q. Where? A. In Oakland.

Q. How long did they stay there?

A. Four days—five days.

Q. Was anything said that seemed to disturb the friendship during that period?

A. We left very good friends.

Q. Was any suggestion made at that time in connection with any of the business that he had been doing here?

A. Everything seemed to be very fine and cordial and everything was good.

(Testimony of Theodore C. Sibert.)

Q. I have reference particularly to what I understood was some question about collections.

A. Oh, yes. Mr. Hilts notified me over the phone there were a lot of accounts receivable.

Q. Did you take that up? [77]

A. Oh, I spoke to them about it.

Q. State what their attitude was?

A. There was no attitude, so much, to me. Mrs. Brewer seemed to have gotten mad over something. I don't know that it was over that or what it was, but it was nothing, as far as we were concerned.

Q. When did you again see or hear from Mr. Brewer?

A. I saw Mr. Brewer in the hotel room next after he had sent in his letter that he was quitting, in August.

Q. You say he sent in a letter? A. Yes.

Q. Refer, in those exhibits you have there, to Exhibit No. 42. I will ask you if that is the letter to which you have reference. It is in the file here. I will ask you if that is the letter to which you have reference?

A. Yes, this is the letter of June 24th.

Q. July, isn't it? A. July 24th, yes.

Mr. Rankin: Your Honor, this letter is pleaded in the pleadings. I shall not take the time to read it.

Q. I note a provision of the franchise in which there is a 90-day provision for terminating it. Is that the letter upon which the termination was based? A. It is not.

Q. What was the termination? [78]

(Testimony of Theodore C. Sibert.)

A. This is the letter upon which the termination was based, yes.

Q. That is what I mean, but not in compliance with the contract?

A. It was not in compliance with the contract.

Q. When did you receive that letter?

A. This letter came into my office June 26th. It was written June 24th.

Q. It shows on its face it is July.

A. I mean July. I am sorry. July.

Q. Had there been anything, up to the date of the reception of that letter, in July, 1947, that indicated to you that Mr. Brewer was dissatisfied with his association with Paramount Pest Control Service?

A. Nothing whatever. It was just the reverse. He always said he had the best business in Paramount Pest Control Service, always bragged on it, and was very satisfied.

Q. Had there been anything indicating a dissatisfaction on Mrs. Brewer's part prior to the time of the reception of that letter?

A. Nothing that I know of, sir.

Q. Did she ever tell you anything that she was dissatisfied about?

A. Just a few different things, which I paid no attention to.

Q. Anything about the compensation her husband was receiving?

A. Nothing. I never talked those things over, only with the parties involved. [79]

(Testimony of Theodore C. Sibert.)

Q. What did you do when you received this letter?

A. I was on my vacation.

Q. Did the Brewers know you were going on a vacation?

A. They did.

Q. How did they know that?

A. It was talked about when they were at my house, as my house guests.

Q. When did you go on your vacation?

A. Well, let's see——

Q. Where, first, did you go on your vacation?

A. Up to Strawberry to build a cabin, with my wife.

Q. Where is Strawberry?

A. In California.

Q. Were you there when this letter was received?

A. I was up on my vacation, yes sir.

Q. What did you do when you got this letter?

A. I immediately came into Oakland and then came up here.

Q. What did you do while you were here?

A. I called Charlie up and asked him to come and release the chemicals and equipment which he had. He came up to my room. He had refused to do that heretofore. He came up to my room and said he would release them.

Q. Did he then give you any explanation as to this letter or any reason for his termination?

A. His explanation was only one, that he had to do it on account [80] of his family.

(Testimony of Theodore C. Sibert.)

Q. Did he say why he had to do it on account of his family? A. He did not.

Q. Generally speaking, without going into detail, did you find then that there was any solicitation by Brewer, from your investigation and service with the company, of any of the patrons that had theretofore been patrons of Paramount Pest Control Service?

Mr. Bernard: Object to that as calling for hearsay testimony.

The Court: He may answer.

A. I sure did.

Q. (By Mr. Rankin): Did you find that there had been some solicitation?

A. Everywhere our boys went they found that trouble.

Q. Now, a few questions that I think possibly I overlooked as I ran through this hurriedly. Did you expend any money in the organization of this business?

A. I have, lots of money.

Q. Can you give the Court any idea of how much and on what phases of it you expended this money?

A. You mean the business in Portland?

Q. No. I mean the business in general, first, and then in Portland.

A. Yes. We take a certain amount of our profits to experiment with—— [81]

Q. Just a moment, Mr. Sibert. Let us go back to the beginning. I realize it is going back to what

(Testimony of Theodore C. Sibert.)

you testified to, to some extent, this morning, but when you formed this business, you and Fisher, as a partnership, did you expend any money then?

A. We expended everything we made into establishing this business, every effort—That took all we had.

Q. Was that the original expenditure—I mean, was the original expenditure all that you had put in?

A. Oh, we put everything that we had in the world into this business.

Q. But, subsequent to its origin, state whether or not you still made expenditures in behalf of it?

A. We did continue to do that. We spent money for education, for experimental work, and for getting the best chemicals to apply to these specific insects that will work the best for us.

Q. I don't think I asked you anything about Duncan. When did Duncan come into your employ?

A. In 1942.

Q. And what did he do?

A. He was a serviceman for quite a few years and he was very adaptable to teaching field men, to break in servicemen, show them the correct way to distribute the poisons, and to mix the inert ingredients in certain poisons and place them in a safe place—in containers and so forth, that is necessary to keep from contaminating foodstuffs and injuring carpets, varnishes [82] on floors and so forth.

Q. Was he a very good man in your employ?

A. Duncan was a very fine employee.

(Testimony of Theodore C. Sibert.)

Q. I think you testified this morning you sent him up here to instruct Brewer. Did he continue to remain in the employ of the company after you sent him up here? A. Yes.

Q. When did he terminate his services, as far as you know, with Brewer? That would be August 1st, 1947? A. Yes.

Q. Have you tried to get service upon him in this case? A. I have, sir.

Q. Do you know Merriott?

A. Not personally. He was hired—I don't know Merriott personally.

Q. Did Mr. Brewer ever ask you for permission to hire Merriott? A. No, sir.

Q. Is that a desirable feature of your contract, that you ask the agent to tell you whom and when he employs men? A. The contract——

Q. Is it a desirable feature of your contract?

A. No, it isn't.

Q. You don't understand my question.

A. I am sorry.

Q. What? [83]

A. It is desirable. I know what you mean now. It is a desirable feature of our contract.

Q. Why?

A. Because we know we have more experience in hiring men than these men do out here, and it is in our contract that we desire to help hire their men, and we reserve the right to eliminate them from the service at any time.

(Testimony of Theodore C. Sibert.)

Q. State whether or not they have a responsible position in the performance of work in connection with poisons? A. That is true.

Q. How much of the information as to these formulas and methods of application and so forth did you give to your employees?

A. All that is necessary, so that they can do their work in an efficient professional way.

Q. Did you give them the detail of the composition of any of your formulas and poisons?

A. You mean the formulation of the formulas themselves?

Q. Yes.

A. Only to the extent where they must insert the inert ingredients.

Q. Did you ever know, in connection with Mr. Rightmire, Mr. Duncan or Mr. Merriott, that they were leaving your employ prior to the time that they went with Mr. Brewer?

A. I knew nothing. It was a big surprise.

Q. They never notified you, either verbally or in writing? [84] A. No, they didn't.

Q. Did they ever personally give you any explanation why they left you?

A. They did not.

Q. Did you, at the time you came up here, ask for and secure an inventory from Mr. Brewer of whatever he had that you were entitled to purchase under your franchise? A. I did.

Q. Did you get the inventory?

A. After I got here, we got the inventory.

(Testimony of Theodore C. Sibert.)

Q. Did you get delivery of all materials that you found by that inventory you had a right to purchase?

A. We got delivery of what was in the warehouse.

Q. Were there other materials that you did not get delivery of? A. Yes.

Q. This letter that is in evidence as terminating his association mentions that he might want some of these things "in the future." Do you know what he had reference to when he states he might want those things "in the future"?

A. I did not.

Q. With respect to his living up to his contract, were there any features that you recall that he did not perform which, under your operation of the company, he was required to do? For example, let me expedite this so as not to take too much time in your consideration. [85]

The contract provides, Paragraph 4, Page 2 of the contract, that he will take all contracts in the name of the company. I mean, take contracts in the name of Paramount Pest Control Service?

A. Yes.

Q. Will you turn to Exhibit No. 40-A.

A. I have it, sir, 40-B. Just a minute. 40-A.

Q. Is that supposed to be in the name of Paramount Pest Control Service?

A. 40-A is an expense account.

Q. Let me see it. May I see it, please? I probably have the wrong number here, apparently. Yes,

(Testimony of Theodore C. Sibert.)

that is the wrong number. There are two 40-A's apparently.

What I have reference to is this Indenture of Lease, "Made this 1st day of November, 1946, by and between The House of Celsi, an Oregon partnership, hereinafter called the Lessor, and C. P. Brewer, doing business as the Paramount Pest Control Service, 519 N. W. Park Avenue, hereinafter called the Lessee."

First, how do you indicate whether you have serviced a particular place or not?

A. We have a card that we hang up.

Q. Is that the card?

A. That is our card.

Q. It reads: "To Our Patrons. We have Paramount Sanitary System. An assurance of cleanliness." [86]

Did Mr. Brewer put out a similar card when servicing patrons? A. He did.

Q. Is this the card?

A. This is the card.

Mr. Bernard: Have you got an exhibit number on that?

Mr. Rankin: Yes, just a moment. It is 40-A. There are two 40-A's.

Mr. Bernard: That is all right. That is close enough.

Mr. Rankin: I also want to offer in evidence, your Honor, a bill of sale. No, that has been offered—I am sorry. But I do want to call this to your particular attention because it is the one Mr.

(Testimony of Theodore C. Sibert.)

Sibert signed afterwards. Do you gentlemen have any particular objection to this because of that fact?

Mr. Bernard: No.

Mr. Rankin: Thank you. You may cross-examine.

Cross-Examination

By Mr. Bernard:

Q. This partnership, you say, was formed in 1937, was it? A. No, sir.

Q. What year? A. 1938.

Q. Had you been in the pest control business prior to that time? A. I had. [87]

Q. What other work——

A. I want to answer that exactly right. I had been in business, but not for myself before.

Q. What other business were you doing at that time?

A. I am a general contractor, building superintendent, carpenter work, cement work, plaster work.

Q. How long did you continue those occupations after 1938?

A. I never continued those only in my own work.

Q. Did you continue in those occupations?

A. Only in our work. When we first started, I worked at carpenter work.

Q. How long did you continue in those occupations after 1938?

(Testimony of Theodore C. Sibert.)

A. You see, sir, those occupations is in our business. We do termite work. We are still continuing carpenter work, cement work and plaster work.

Q. What other business was Fisher in at the time the partnership was organized?

A. He was in the extermination business.

Q. Where was your place of business when Brewer went to work for you?

A. This is '38. The head office was 638 Sixteenth Street.

Q. Where? A. Oakland.

Q. How big a place did you have?

A. We owned our own building—we own our own building and [88] have quite a space.

Q. How big a place?

A. I don't know the exact size of the building.

Q. What date was it Brewer came to work for you?

A. July 4th, according to our records. February 4th; sorry, February 4th.

Q. February 4th? A. 1947.

Q. What date did he come to Portland?

A. Around the first of April.

Q. You have referred to certain labels which are in evidence here. Those labels are put on the cans of poisons or preparations, aren't they? These labels that you referred to in your evidence are put on the cans of poisons or preparations?

A. Yes, sir.

(Testimony of Theodore C. Sibert.)

Q. Those labels contain the ingredients, do they?

A. Those labels contain the ingredients that are in the cans.

Q. So anybody that got hold of one of the cans could see what the ingredients are?

A. That is right.

Q. You say you do not put on the label the inert ingredients?

A. I did not. Some labels you do and some labels you don't, but the inert ingredients, they have to be in there.

Q. What is there that is secret about these concoctions or formulas that you give your salesmen to use or the other men [89] who work for you to use? What is there secret about it?

A. You understand, Mr. Bernard, the contents of the label is merely the quantity to the gram. That is on the label on the package. That is the law. The secret is the formula in which they are melted or mixed together to get a certain product to do a certain job and to kill a certain type of insect.

Q. That is the secret part of it?

A. That is the secret part of it.

Q. Did you or your company ever, at any time, furnish any of this secret information to Mr. Brewer?

A. Yes, sir.

Q. When?

A. From the time he started out to work for us. There is a certain portion of that he has to learn.

(Testimony of Theodore C. Sibert.)

Q. You mean to say you furnished Mr. Brewer any information as to how to concoct any of these formulas?

A. You misunderstand—That question can be answered Yes and No. There is certain chemicals that we concoct—You say “concoct”—We formulate certain chemicals with inert ingredients that is put out on the job. We have to show him how to do that.

Q. Describe what you mean by “inert ingredients.”

A. The inert is the volume of matter or liquids that is in the poison.

Q. I see. What do they usually contain?

A. In rat bait it is any type of stuff that will—You might [90] say, apples, carrots and so on, any type of bait—different types. In liquids it is—

Q. What is there secret about that?

A. So much of this is put in a certain formula to get a certain strength and so it could be attractive to a certain type of animal or insect.

Q. Can't that information be secured through other sources than yourself?

A. It might be, but not like Paramount gives it out.

Q. Who do you say gave Mr. Brewer this information? A. Mr. Duncan.

Q. Did you?

A. Not personally; some, yes.

(Testimony of Theodore C. Sibert.)

Q. What information did you give him?

A. I have been with Mr. Brewer on several jobs and showed him lots of things, and we talked—gave him information of my past experience. That is why I came to see him.

Q. You tell the Court what secret information you ever gave Mr. Brewer at any time about the formulas or concoctions that you put out for bait.

A. You mean one definite, special thing?

Q. Yes.

A. You want the time and place?

Q. I want the information, what it was. Tell the Court what secret information you ever gave this man. [91]

A. I gave Mr. Brewer secret information on fly or rat baits.

Q. Information?

A. What types of inert ingredients with a certain amount of active poisons to put out as certain types of rat baits to do a certain job, to kill certain animals or insects.

Q. Can that information be secured elsewhere?

A. He can't secure my experience elsewhere.

Q. Your experience, as a matter of fact, he can secure from other sources—how to put these inert ingredients in with the poisons in order to kill rats or insects? There are other sources that put out that information?

A. We are a service organization, not a sales organization, and our formulas and our advice is more profitable to anybody than something that somebody has made for sale, and information thereof.

(Testimony of Theodore C. Sibert.)

Q. Have you been as definite as you can as to any secret information or formulas that you gave Mr. Brewer?

A. Repeat that question. I don't understand, Mr. Bernard.

Q. Have you been as definite as you can as to any secret information or formulas that you ever gave Mr. Brewer?

A. I could have give him more secrets. I was definite in what he needed and what he could take at the time, and according to the situation thereof.

Q. How long did this instruction continue down there in California? [92]

A. Until all his time there, two months.

Q. What sort of work was he doing during those two months?

A. He was doing—he was going with Mr. Duncan to be broke in our service work.

Q. He had been doing service work?

A. In going with Mr. Carl Duncan, yes.

Q. He was in your employ in the laboratory that you speak about, wasn't he?

A. No, sir.

Q. When he came up here, then, in April, it was with the idea of making him manager of the Oregon territory, was it?

A. That was our understanding, sir, before he went to work.

Q. After he had been employed by you for about six or seven weeks?

A. We had that understanding before he ever went to work. I was merely keeping my promise.

(Testimony of Theodore C. Sibert.)

Q. You figured that six or seven weeks' work as a serviceman rendered him capable of carrying out this tremendously important work of insect extermination in Oregon, as manager?

A. Sir, I did not.

Q. Why did you make him manager of the concern?

A. Because he was hired for this district and we sent somebody up here to help him.

Q. That was Mr. Duncan?

A. Mr. Hilts and Mr. Duncan, yes. [93]

Q. Did you come up at the time he was employed? A. Where, sir?

Q. Come up to Oregon?

A. I wasn't here when he came. I came up in April—He came the first of April with Mr. Hilts. He brought Mr. Hilts up. Mr. Fisher arrived here April 6th, Mr. Bernard.

Q. Where was the office of the Paramount Pest Control Service at that time?

A. I don't have the exact address but it was in Mr. Taylor's home. We had phone service—we had a phone there, and we had phone service on Taylor Street. I don't remember. I could look it up for you.

Q. Was Mr. Taylor the previous manager?

A. He was.

Q. And the headquarters of the concern were out at his home, is that what you say? A. No.

Q. Where were the headquarters?

(Testimony of Theodore C. Sibert.)

A. The headquarters office and those things was in the office on Taylor Street. He merely had the poisons and things like that at his home and kept some books at his home.

Q. The poisons and things of that kind were kept at his home?

A. Yes. He had a storeroom which we were renting there.

Q. Do you know about how long Mr. Hilts was here at that time? A. I do. [94]

Q. How long?

A. Mr. Hilts came up with Mr. Brewer and I came up the 23rd of April. We passed on the way, going back. I came up on the train. He left that day to go back to get his car to come back here.

Q. Did Brewer have to take an examination in California before he came up here?

A. He did not.

Q. Do I understand you to say from the time Brewer came here to the time he wrote this letter of resignation that you had no disagreement between yourselves at all, is that correct?

A. That is correct; the best of friends.

Q. You did, however, in response to Mr. Rankin's question, call attention to the fact that he took the lease in his own name and not in the name of Paramount?

A. I knew nothing of the lease, sir.

Q. You know it now?

A. I know it now, yes.

(Testimony of Theodore C. Sibert.)

Q. Did Paramount take out some insurance for him of any kind?

A. What type of insurance?

Q. Of any kind? Liability insurance?

A. We have a broker in Oakland that writes insurance for our office there and all of our business.

Q. Do you know how that insurance was written?
A. Yes. [95]

Q. How was it written?

A. Paramount Pest Control Service, doing business as Brewer, I think.

Q. Wasn't it written Charles Brewer, doing business as Paramount Pest Control Service?

A. Maybe. I don't know. I never did see the policy, sir.

Q. Will you be as definite as you can, so we can cut the examination short? When and where was the first discussion had by you and Brewer, according to you, as to the change in the terms of this contract?

A. You mean the change of payment?

Q. Yes. A. September 12th.

Q. You say that took place in Portland?

A. Yes, in Portland, in Mr. Brewer's home.

Q. Brewer assigned as a reason for that change, what?

A. Mr. Brewer wanted to have an expansion of business, a program of putting on business, and the reason he assigned was this, that he had only

(Testimony of Theodore C. Sibert.)

taken so much money home, and asked me if I would go with him and help to finance the new business so that we could all profit thereof, and our agreement was: I said, "Charlie, I am not a big man, a big bad man, trying to take advantage of anybody. If you want to live cheap at home, I will take that same amount, up to that period of time, so that we can put this business on." [96]

Q. He thought he could make more money under that arrangement, didn't he, in the future?

A. Yes.

Q. You agreed to that?

A. I agreed for a change of payment, dollar-for-dollar payment. When Charlie would take a dollar home or if he took \$5 to live on, that is all I would take, and spend the rest in the expansion or building up new business.

Q. That was the agreement you made which you say you forgot to mention to the other men until December?

A. That is right.

Q. When was the next time that any question arose between you and Brewer as to the times of payment under this contract?

A. I didn't know there was a question, sir.

Q. When was it ever discussed between you after that, between Brewer and you, or you and Hilts?

A. We had a talk about that on the trip, June 17th.

(Testimony of Theodore C. Sibert.)

Q. How about this arrangement in March when this letter was written?

A. I didn't talk with Brewer. We just tried to show him the expenses that would be charged to him—it looked like there was going to be a charge to this district, and we wanted to show Mr. Brewer that we was still going the other mile.

Q. Do I understand, then, that this arrangement that was made in March was agreed upon by you and Hilts? [97]

A. It was. And he said in March, that was the first time it was exactly clear to him, and he thought it was a fine way to treat a company and a fellow in the field, and that was his idea. Hilts says, "Why don't you help Charlie," he said, "on this Eastern Oregon deal?" and I just consented; that is all.

Q. That was done without any previous communication between you and Brewer, is that a fact?

A. Myself and Brewer, yes.

Q. Do you know whether Hilts had talked with Brewer about it?

A. I didn't know. I wasn't here. I don't know.

Q. Did Hilts tell you whether he had or not?

A. He said Charlie had mentioned it to him.

Q. What did he say that Charlie had said?

A. Mr. Hilts is the auditor and he must have talked to Charlie about it to get, you know, a correct understanding of it, and he said Charlie merely mentioned it to him.

(Testimony of Theodore C. Sibert.)

Q. Did he tell you Charlie had objected when Hilts had presented a statement based on a 20-80 per cent beginning the first of January?

A. He did not.

Q. You say the first time you and Brewer had the matter up was in June?

A. The first time Mr. Brewer and I ever talked about anything like that except that one time was in June.

Q. You want the Court to understand that, although Mr. Brewer [98] had requested this change in 1946, although you and Hilts had agreed to continue the change in March, 1947, to help Brewer out, that Brewer told you, between the 17th and 20th days of June, that he wanted to come back on the 20-80 basis because he would make more money that way?

A. I do.

Q. You never had any idea to the contrary, that there was any trouble, until you received this letter which was written on July 25th?

A. I had no idea. I thought we were the best of friends and things were going to continue.

Q. Then, the letter of March 15th that Hilts sent out, that letter was sent by Hilts after his conversation with you, wasn't it?

A. It was, in the Oakland office.

Mr. Bernard: That is all.

Mr. Rankin: You are excused, Mr. Sibert.

(Witness excused.) [99]

E. W. BUSHING

was thereupon produced as a witness on behalf of plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rankin:

Q. Give your name to the Court.

A. E. W. Bushing.

Q. Where do you live, Mr. Bushing?

A. 1325 San Francisco Street, Vallejo, California.

Q. What is your occupation?

A. I am an entomologist.

Q. How long have you been such?

A. I graduated from the University of Illinois in 1942, with a degree from the School of Liberal Arts and Sciences—majored in entomology.

From that date until September I worked for the Dupont Experimental Station in Newark, Delaware, as entomologist, not for Dupont but for the Delaware Agricultural Experiment Station.

Q. Have you had practical experience in the field?

A. Yes. After working three months for that station in the practical application of insecticides, I went into the service for three years and a half.

Q. What did you do in the service?

A. Acted as entomologist in the service, in the United States for three years, spent three months in the Hawaiian Islands, and [100] all the time I was in the hospital, in the service.

(Testimony of E. W. Bushing.)

Q. The hospital service?

A. I was in the hospital, in the service.

Q. Oh, in the service? A. Yes.

Q. Did you work in the Dupont Experimental Station and in the Army, when you were not in the hospital—Was it related to your work as an entomologist?

A. Yes, it was. I was one of the fortunate individuals who went through the service in the bracket in which he had been trained at the university. My training in the university helped me in this respect in the service. I was responsible—If any of you are familiar with Army procedure, a sanitary officer is detailed on the basis of ten thousand personnel, and charged with the responsibility of the complete routine of rodent and insect control, in addition to other duties, and I was detailed on that basis here in the United States, and at Hickham Field, Hawaii, I was Chief Quarantine Officer on all incoming ships from the Orient.

Q. Have you worked with the Paramount Pest Control Service?

A. I am in their employ in July, 1946.

Q. Are you still in their employ? A. I am.

Q. As an entomologist, do you have anything to do with rodent control? [101]

A. Yes.

Q. The experience that you have described, does that relate to rodents as well as insects?

A. Yes.

(Testimony of E. W. Bushing.)

Q. In the Paramount Pest Control Service, do you have anything to do with the matter of poisons?

A. Yes, I am directly responsible for the formulation of all Paramount's formulas.

Q. Do you have anything to do in that service in connection with pests, insects or rodents?

A. Yes, from the standpoint of issuing explanations to all the personnel as to the uses of all these formulations.

Q. Do you have anything to do with the application, the means of bringing these poisons and these pests together?

A. Yes. We endeavor to supply our personnel with the best available equipment, going even as far as first experimenting and testing it there in the Oakland office before submitting it to them for their use.

Q. In the Paramount Pest Control Service, do you come in contact with any of the field operators or the men who are doing the practical work of controlling pests?

A. Yes, I do. I am at their service at any time that they so wish, in order to assist them at any time in their work, regardless of what their problems might be; they not being able to solve it, I would be more than willing to come out and travel [102] in the case of Portland or Seattle or whatever it might be to solve these problems for them, even to the extent that I would personally help them out with these problems.

Q. I would like to hand you the exhibits relating to poisons that have been identified by the president

(Testimony of E. W. Bushing.)

of the corporation, enumerated No. 5-1 to No. 5-26, and ask you to refer to them. You are familiar with those, are you not? A. Yes, I am.

Q. You have seen them in this form as they are presented here, before? A. Yes, I have.

Q. Mr. Bushing, it is the contention of these defendants that there is nothing unique about these poisons, that you can go out and buy them on the common market anyplace.

Will you take these exhibits, No. 5-1 to No. 5-26 and explain them. Explain what there is about them that this court should know in connection with the contentions made by the defendants. Refer to Exhibit 5-1, if you will, please.

A. 5-1, Paramount Ant Syrup.

Q. Is that on the common market?

A. There are many ant syrups on the market, yes, but not the Paramount Ant Syrup.

Q. What do you mean by that?

A. We have in the Paramount Ant Syrup incorporated an unusual inert ingredient. On the label we do not have to state what [103] those are, specifically. All that is necessary to state on the label is what the active ingredients are, those poisons which are defined in connection with the registration of economic poisons in the State of California.

As I have previously mentioned, there are others on the market, but we have incorporated into the inert portion of the product an ingredient which has made this more attractive, in our estimation, to ants.

(Testimony of E. W. Bushing.)

Q. In what particulars is it made attractive, more attractive?

A. We believe it is more attractive because, if the other syrups could be placed side by side, we think we have found through experience that they will prefer to accept ours.

Q. Just to clarify one thing: Those labels seem to be divided generally into inert and active ingredients.

A. Yes, sir.

Q. Active ingredients are what?

A. Those ingredients which are required to be specified on the label. They include those ingredients found in the list of economic poisons registered by the State of California.

Q. Inert ingredients are what?

A. Inert ingredients are only that part of the formula which may be either necessary to complete that formula or—When I say that it is necessary for them to be in there to complete the formula, I mean without that chemical existing in the inert ingredient, the ultimate product could never be gotten. [104]

Q. The next one, 5-2, what is that by name?

A. No. 5-2 is Paramount Bed Bug Spray.

Q. Is that on the common market?

A. No. Paramount Bed Bug Spray is not on the common market.

Q. Is there anything unique about this Paramount preparation?

A. This is a product in which we have incorporated a highly volatile solvent. The primary reason for this highly volatile solvent being present is that

(Testimony of E. W. Bushing.)

in spraying furs, clothes closets, et cetera, the high volatility permits very little damage to the fabrics.

Q. Take the next, 5-3.

A. Paramount Bed Bug Spray F2.

Q. Is that on the common market?

A. No, Paramount Bed Bug Spray F2 is not on the common market.

Q. There is bedbug spray that is on the common market?

A. There is, yes.

Q. How does this vary from the common market variety?

A. In this formulation we have developed a DDT percentage which, in our spray, does not leave undesirable residue as, for example, upon such things as furs, rugs, et cetera. I feel that this is a decided advantage. One of the larger railroads, for instance, objected to there being too much of a powdery residual on the fabrics from the use of excessive DDT.

Q. What is the next one?

A. Paramount DDT Barn Spray, F2. [105]

Q. Is that on the common market?

A. Yes, that is on the common market.

Q. Is that registered by Paramount?

A. We have registered that Paramount formulation because, included in the formula are the directions. Without directions the formula is no good. By that I mean, the raw substance has to be included with the application and proper directions are necessary.

(Testimony of E. W. Bushing.)

Q. What is the next number?

A. Fly spray F2.

Q. What is the exhibit number?

A. This is No. 5-5.

Q. Is that on the common market?

A. No, that is not. Paramount Fly Spray F2 is not on the common market.

Q. What is unique about that?

A. We have in this product, from our experience, added an increased amount of a particular solvent. That solvent is included in the active ingredients. Any material that will aid in the destruction of insects must be included in the active ingredients. That solvent aids in the dispersal of the DDT to the extent that this product differs greatly from others if for no other reason than the results.

Q. Just for the moment, this thought occurs to me: Suppose you had an active ingredient or suppose you had a formula that contained [106] elements A, B, C, and D, and you mixed them in that order; suppose, for the purpose of insecticide or rodent control, you mixed them A, D, C and B; would you have the same result?

A. No, you would not. If you would like, I can bring one of those——

Q. Does that appear later?

A. Yes, it does.

Q. Bear that in mind and call it to our attention when you come to it. Take No. 5-6, what is the name of that?

A. Paramount Fungus Solution.

(Testimony of E. W. Bushing.)

Q. Is that on the common market?

A. No, this particular product, Mr. Rankin, is not on the common market.

Q. Is it unique?

A. It is unique from the standpoint that there are very few, if any, people, individuals, who are acquainted with fungus. Consequently, there is no market demand for fungus solutions. Fungicides must be prepared according to the individual fungus. They cannot promiscuously be made to satisfy a general requirement. This particular product is used upon identification of a specific fungus.

Q. How is that fungus identified?

A. The fungi are identified under microscopic examination only. There is no prescribed examination that is adequate. To get down to a little more detail, the actual spores in the fungus [107] growth are identified,—

Q. That is, only by laboratory facilities could you make a proper analysis of a fungus?

A. You may be able to make it only to the extent of a generalized classification; you could not, to the extent of a complete identification.

Q. Take No. 5-7, what is the name of that?

A. Paramount Insect Powder.

Q. Is that on the common market?

A. No, Paramount Insect Powder is not on the common market.

Q. Is there anything comparable to it on the common market?

A. There is a product on the market, namely, sodium fluoride, which is an accepted roach powder.

(Testimony of E. W. Bushing.)

Q. Anything unique about this, in differentiation from the one you mentioned?

A. Through our long experiments in the business, over a period of years, we have acquired from various chemical houses, the possibility of securing an unusual product from this standpoint: In the manufacture of pyrethrins, which is incorporated in this formula, there is, falling off from the mill that grinds up a flower from Japan, a dust similar to what you have when you make coffee. That dust falls off and is collected and sold. However, that dust, being in such limited quantities, is only sold to those individuals or some concern with a priority, we will say, a priority that you get through long dealings. Consequently, [108] you have here 1.45 per cent pyrethrins. The usual percentage of pyrethrins on the market, instead of being 1.45 per cent, is only .9 per cent, so that almost again as much pyrethrin is actually contained in this product, and the results are double and the efficiency is tremendous.

Q. Has it a lethal quality or not?

A. It is highly lethal, a highly lethal quality, from the standpoint of an active ingredient. That is why we have incorporated pyrethrins into this product. Sodium fluoride in itself, as I just said a while ago, is an accepted roach powder. I do not deny that or that you can find sodium fluoride on the market anywhere. I am not contending that at all but, just as in coffee, there are those that are excellent and those that are very poor. An insecticide is no different.

(Testimony of E. W. Bushing.)

Q. The next exhibit, No. 5-8.

A. Paramount Insect Spray.

Q. Is that on the common market?

A. No, Paramount Insect Spray is not on the common market.

Q. What is unique about that?

A. That is one of those products I was referring to a minute ago, where you can mix it A, B, C and D——

Q. Please tell the court about it.

A. First of all, this is an exclusive formulation of ours. There is no other formulation like it available on the market.

In respect to this particular formulation, we had used [109] this for several years. During this last summer, in Mr. Brewer's territory, as well as in Washington and in our home state, we used this particular product exclusively.

For economic reasons we decided to give one of the very reputable oil companies in this state, here in Washington, and all over the United States, the opportunity of supplying us with a product that they claimed was comparable. This product is five per cent DDT, plus the necessary ingredients which are lethane, pyrethrin, plus carbon tetrachloride, plus a petroleum base.

They came to us and, naturally, from the standpoint of economy, we are interested in having this supplied to us, so for three months, June, July and August, we used this product.

(Testimony of E. W. Bushing.)

After three months' time we had so many complaints; in fact, we even had cancellations of contracts due to this product that this extremely large oil concern was putting on the market as being comparable; in fact, they were to such an extent that we pulled back their product from use and substituted our own.

Now, at the time that this occurred, this large oil firm was naturally interested in knowing why. Consequently, they came to us and asked for samples of our product to take them to their laboratory. Their explanation as to why ours is better need not be brought in here, except to this extent, that it was proven better. When we put them back in our service again, it completely eliminated all the complaints that we had [110] had.

Q. Take No. 5-9. What is the name of that?

The Court: How many are there? Twenty-six?

Mr. Rankin: There are twenty-six.

The Court: Don't go through every one of them.

Q. (By Mr. Rankin): Will you pick out some exceptional ones that you claim to be particularly unique and particularly lethal?

A. I have some here I would like to bring out—

Q. What is the first one, the exhibit number?

A. Exhibit No. 5-20, sodium fluoroacetate technical.

Q. Is it on the common market?

A. Not by any means, no. Sodium fluoroacetate is known to the general public as Compound 1080.

(Testimony of E. W. Bushing.)

This product is by no means available on the local market. It is not sold on the local market because the Monsanto Chemical Company, which manufactures and sells Compound 1080, sees to it that the companies that do buy it have a designated amount of insurance, namely forty and eighty. You must supply a certificate that you have that amount of insurance coverage. We have insurance coverage of not only that but one hundred thousand to two hundred thousand coverage.

It is unique in this respect: It is an extremely lethal poison. There is no antidote. In addition to the fact that there is no known antidote, it is usually sold only to those commercial companies that have satisfied these requirements.

Now, in attempting to use sodium fluoroacetate technical, [111] there has been much dissension from the public about its extreme potentialities. Nevertheless, it has a place in this industry and will continue to be used.

For the information of the Court, the Wild Life Service is one that is doing excellent work in furthering and advancing this product. One of my personal friends is in the Wild Life Service and has done much of that work.

Q. Do you know how many firms or companies are qualified to secure this?

A. I don't know offhand.

Q. What is the other product that you have there?

(Testimony of E. W. Bushing.)

A. I would like to bring this particular product up, primarily because I believe it shows what the secret is about the manufacture of formulas. In fact, I believe it is one example, even though it is more prominent, you might say, than others.

That is Paramount's Termite and Fungus Mixture, Exhibit 5-21. In the Termite and Fungus Mixture, there are at least six registered economic poisons, at least six. However, going into this formulation, there are at least eight. Immediately one begins to wonder, "Why aren't those two registered?" Those are the inert portions and, in the finished formulation, there is no trace.

I mean, in this respect, which our counsel was attempting to bring out: When you mix A, B, C and D, for instance, in this formulation, that is one thing. If you were to mix A, C, D [112] and B, it does not mean that you get the same results. The additional ingredients in here are caustic soda and sulphuric acid. Should this formulation fall into the hands of some other individual, it would be totally impossible for him to totally remix the formulation, because in it there is no indication that there is caustic soda and sulphuric acid so, consequently, if he made the attempt, taking what was available on the label, the product would by no means compare in efficiency or, in fact, do the job that it was originally intended for.

Q. That is sufficient on the matter of poisons. About the pests, are you familiar with the various pests sought to be controlled by this service?

(Testimony of E. W. Bushing.)

A. There are continually developing in this field additional pests beyond those that were originally fought. By that I mean that has mostly come about as a result of the last war.

Those pests that we are concerned with are referred to in California as structural pests. Those pests are those most commonly found in homes, warehouses, theaters and so forth, and would include such things as bedbugs, ants, fleas, ticks, rodents, rats and mice, such things as those which are referred to in the structural business,—referred to as structural pests, I should say.

Q. Are there any that are becoming unusual or new in the field?

A. Yes. We have many forms of bedbugs being introduced into this country from the Orient. Of course, when one says "bedbugs," [113] the natural opinion is that they can be controlled by some product that we had before. That is not so by any means. Our specific pest, not just "bedbug" but by its Latinized name must be controlled by, we will say, a Latinized formula.

Q. Does it require any knowledge, any classification of a particular pest in order to most effectively determine its control?

A. Oh, yes. One of the best examples I can think of offhand is what is known as the common fruit fly. Unless you identify it specifically, as to the exact species, you can spray until you are blue in the face and you won't control them. By that I mean that Chlordane is the accepted control for one species of

(Testimony of E. W. Bushing.)

this fruit fly, and DDT as the control for another one. For instance, if you use DDT on one to control it and use DDT on the other, you are not going to have any results at all.

Q. Coming to the third classification, or the application of poisons to the pests, is there anything that is required, any particular knowledge or training, in regard to that?

A. Before the war it was assumed that one material, for instance, could be made and accepted for the control of all pests. That was the assumed theory and it was one that was practiced extensively.

After the war, with new ideas on organic chemicals, it was found, instead of having one product that a man was going to do this with he had to have twelve products to control twelve different insects, not that some of these products would not be [114] controlled to a minor degree. Wherever he had a job, it was suggested to this customer that it was efficient that he use only that compound specifically developed for that insect and that insect only.

If you would like for me to just give you an example: Chlordane is one of the latest products on the market. That product was put on the market just about, at least, two years ago and was slow in being used. When it first came out, it was thought it would be available to do a lot of things and was going to replace DDT, and was good for everything. In my estimation, Chlordane is good for only three insects and DDT for approximately two.

(Testimony of E. W. Bushing.)

The Court: What do you mean, "approximately two"?

A. It is used against many others with incomplete results, as you get if you use another product.

Q. (By Mr. Rankin): In the application of the poison to the insect, is there such a differentiation as killing an insect, in one instance, or having it spread, continue to spread to other insects or rodents? Is there such a differentiation?

A. You are speaking about the chemical now?

Q. Yes.

A. If I understand, you are. This is my explanation——

Q. Yes.

A. In spraying for control of various pests DDT is known not as an agent that kills upon mass dispersal but as an agent that [115] kills after it has been deposited upon a wall, for instance. The ordinary housewife, when she gets one of these bottles that has a 5-per cent DDT, returns home and disperses it around the room, but in using DDT it is essential, as it is with other products, to put the material exactly where you want it to do the job and nowhere else, not in midair where it can be of no value.

Q. Did you describe what you do, if anything, in the matter of training people to go in the field?

A. No.

Q. Will you give a brief explanation to the Court of what you do in that regard?

A. We have attempted, to the best of our ability, to train all of our personnel, either through direct

(Testimony of E. W. Bushing.)

contact, my direct contact with them, or through the dissemination of information by letter, folder, et cetera.

We have gone beyond that. We have requested them to collect any specimens they were confronted with that they didn't know about and forward them back to me, thinking that perhaps maybe they would collect something that they had never heard about and would be interested in knowing something about it. We have encouraged this tremendously. We have informed them as to the best technique of collecting these specimens and forwarding them to the Oakland office, making it plain to them that nothing could be forwarded alive through the mails—— [116]

That is a Federal regulation.

Now, to encourage them more to forward in their specimens was always at the tip of my tongue when I was out because the unfortunate thing that I was confronted with was that the average individual out in the field, while he could describe it partially, he could not describe it completely enough so I could recommend control measures. That was the reason for the specimens and that was the reason for disseminating this information that kept them abreast of all current changes in chemicals, as much as possible.

In particular, this fact: We don't want them necessarily to have information about a chemical in a scanty way only. One could do more harm by getting limited information about chemicals than you can do good. After all, it was up to us in the Oak-

(Testimony of E. W. Bushing.)

land office, and my department in particular, to choose those materials that would be used and those that would be used only in the control of each specific pest.

Q. To bring this down to the present situation, did Mr. Brewer himself ever make any application to you for information?

A. Yes, he received his training during the latter end—I can't give you the exact date. It must have been during the summer, but I received a letter in which he asked me——

Q. Was he still in the employ of Paramount?

A. Yes, he was. ——a letter in which he asked me to identify—— [117]

Mr. Bernard: I think the letter would be the best evidence. A. Pardon?

Mr. Bernard: I am making an objection.

The Court: Do you have the letter?

Mr. Rankin: I do not believe we have it.

Q. Just state in general terms what the inquiry was, if you will, and what you did in connection with it.

Mr. Bernard: I renew the objection.

The Court: He does not have the letter, he says.

Q. (By Mr. Rankin): Where is the letter, Mr. Bushing?

A. I have it in my folder in the hotel room.

Mr. Rankin: All right. I will call you back later. You may cross-examine. We will be able to produce the letter later.

(Testimony of E. W. Bushing.)

Cross-Examination

By Mr. Bernard:

Q. When did you first meet Mr. Brewer?

A. That date I don't remember exactly, sir. I would say roughly a year ago.

Q. How often did you meet him during the year?

A. I met Mr. Brewer only when he came down to the Oakland office.

Q. Once? A. At least once, yes.

Q. Where did you meet him at that time?

A. In the office; in the Oakland office.

Q. Did you give him any technical information at that time? [118]

A. None was asked, sir.

Q. Now, as I have followed your testimony, up to the time you got to Exhibit 5-8—Will you take those exhibits? A. Yes, I will.

Q. You say that Paramount products were better or you thought they were better than similar products that could be bought on the market, is that correct? A. I did.

Q. From No. 5-8, will you run through and tell us what exhibits indicate products where similar products could be bought on the market?

A. Do you happen to know what 5-8 was?

Q. 5-8. A. I have it.

Q. Paramount Insect Spray.

A. You wish me to go from there on?

Q. Yes, and give me the exhibit numbers of any products of the Paramount Pest Control Service

(Testimony of E. W. Bushing.)

where similar products could be bought upon the public market.

A. I could answer that for you by going through them, item by item, and naming the active ingredients of part of it and tell the material that is available on the local market. That product alone is not, by a long shot, a means of controlling this insect necessarily——

Q. Well, there are similar products selling on the public market, [119] where a person can buy them, or can buy the same thing as Paramount's products?

A. I wouldn't say the same thing, no.

Q. What do you mean by that?

A. The reason I say I wouldn't say the same thing is because many of these products are not on the market at all. I can name one in particular.

Q. That is what I am asking you. You say 5-8 was not on the market at all. I want to find out what other exhibit numbers refer to similar products that can be bought on the open market.

A. Paramount Moth Spray, Exhibit 5-11, cannot be purchased on the market.

Q. No. 9 is moth spray?

Mr. Rankin: No, 5-11.

A. 5-11, yes.

Q. (By Mr. Bernard): Are there moth sprays on the public market?

A. There are moth sprays on the public market. There is no Paramount Moth Spray on the public market.

(Testimony of E. W. Bushing.)

Q. Go ahead and tell me what other exhibit numbers indicate products—— A. 5-14.

Q. Exhibit 5-14 is what?

A. Paramount Poison Grain.

Q. Can poison grain be bought on the market?

A. That can be bought on the public market.

Q. Yes. I asked you to run through the list of exhibits there. A. 5-19.

Q. What is 5-19? A. Sodium fluoride.

Q. Can sodium fluoride be bought on the public market?

A. Yes. That is a basic material for all of those.

Q. Go ahead.

A. I believe that is all.

Mr. Bernard: That is all.

Redirect Examination

By Mr. Rankin:

Q. In the application of these poisons to the insects, I forgot to inquire of you on direct examination whether or not there is more to the application of the poisons than just giving them to the insects? Are there other interests to be considered? Do I make myself clear? A. No, sir.

Q. How about furniture, children, and the other things that poisons might affect, which are not intended to relate to them? Do you have to guard against that? A. Yes, we do.

Q. In making the application of the poisons, do you have to consider whether or not they would be dangerous to human life, health and property?

(Testimony of E. W. Bushing.)

A. Yes, we do. No one in the State of California can label [121] a product without it being first approved by the Bureau of Chemistry and, before they will approve it, these directions must be to their liking.

Q. Do you ever have any difficulty with the chemical department, or whatever department that is of the State of California which governs poisons in connection with getting any particular product that you want to use in your business?

A. Yes. Due to the extreme lethal qualities of sodium fluoro-acetate, their preference was that we handle the technical product by reducing—we knew and realized that there must be a dilution. And, after all, it must be broken down into minor dilutions to do the job that we wanted it to do.

To make sure we had a formulation that would be acceptable to them, we discussed and talked continually with them about a dilution of the formulation. This dilution of the formulation having been worked out, was accepted by them and we secured registration and, by the way, there are very few concerns in the State of California that have a registration for sodium fluoroacetate.

Mr. Rankin: If there is nothing from counsel, we will excuse you while you get that letter. Let me know, when you return.

Recross-Examination

By Mr. Bernard:

Q. You have testified about the application of these poisons. I believe you testified that, with one

(Testimony of E. W. Bushing.)

or two or three exceptions, [122] there are similar products on the market to those indicated by the Paramount label, although you claim that Paramount products are superior.

When you buy those other products on the public markets, of course, directions are given as to how they are to be applied, and so on?

A. Yes, directions are given..

Q. For instance, when you say there are many ant syrups—— A. Yes.

Q. If a man buys ant syrup on the market, of course, he gets directions as to how to apply it?

A. Yes.

Q. That is quite universal in these various concoctions for the control of rodents and insects, is it not?

A. It is more so in that specific instance you indicated than in rodent control. There is one large manufacturer of rodent grain outside of ourselves.

Q. In testifying about Exhibit 5-8, you mentioned a prominent oil concern. That is the Shell Oil Company? A. Yes, it is.

Q. Do they still put out an insect spray?

A. They don't call it an insect spray.

Q. What do they call it?

A. 5-per cent DDT, I believe, the present name is. Yes.

Q. It is supposed to be an insect spray? [123]

A. No, the spray is given that name by a commercial company.

Mr. Bernard: That is all.

(Testimony of E. W. Bushing.)

Redirect Examination

By Mr. Rankin:

Q. Is there any one of these poisons here listed in these exhibits where the combination is not even known about? A. On these labels?

Q. Yes.

A. You mean the composition of them?

Q. Just held by Mr. Fisher and Mr. Sibert?

A. No, there isn't any.

Q. As far as you know? A. That is right.

Mr. Rankin: I think that is all. You may get that letter and then we will continue with the examination later on.

(Witness excused.) [124]

HAROLD W. HILTS

was thereupon produced as a witness on behalf of plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rankin:

Q. State your name to the Court?

A. Harold W. Hilts.

Q. Where do you live?

A. I live at 4131 Randolph Avenue, Oakland, California.

Q. What is your business?

A. Extermination.

Q. With whom are you connected?

A. Paramount Pest Control Service.

(Testimony of Harold W. Hilts.)

Q. Have you any particular department in that service?

A. Yes, auditing department.

Q. Are you also familiar to some extent with the matter of pest control? A. Yes, sir.

Q. When did you first come with this company?

A. About May, 1940.

Q. Was it then a partnership?

A. Yes, sir, it was a partnership.

Q. Who were the partners?

A. Mr. T. C. Sibert and Mr. G. H. Fisher.

Q. Have you continuously remained with the pest control service [125] that they have conducted since that time? A. Yes, I have.

Q. When did you first meet Mr. Brewer.

A. Some time in February of 1946.

Q. Like Mr. Sibert, had you been a fast friend of his, or an intimate friend?

A. No, sir, I hadn't.

Q. Did you ever meet him or have any connection with him, particularly prior to the time he came with this service? A. No, sir.

Q. What did you do to assist Brewer in becoming established, if anything?

A. I brought Mr. Brewer to Portland in May or April, 1946, and assisted him in getting him familiar with the records and establishing his ways here so that he could carry on the business for the company.

Q. Had you had anything to do with him while he was in this short training period there, from February to April, 1946, at Oakland, California?

(Testimony of Harold W. Hilts.)

A. No, sir, only just to pass the time of day with him.

Q. Did you have any association with Mrs. Brewer? A. During that time?

Q. Yes. A. No, sir.

Q. After that time? [126] A. Yes, sir.

Q. In what capacity?

A. She was taking care of the books in the Portland office after that time.

Q. What can you say as to the system of the books as to whether it is required by the company or whether they are allowed to set up their own system?

A. The books are set up by the company, a specific system of accounting is set up. I travel throughout all our territory and I assisted her in getting established along that line after she came to Oregon.

Q. When you speak of all your territories, are they geographically bounded by natural state boundaries or are they split up so that there are two in some states?

A. They are split up into geographical boundaries in the states and also as to state boundaries.

Q. How many general agencies have you got of that nature?

A. Geographically bounded in a state?

Q. Yes. A. Well——

Q. How many agencies altogether, if you remember, Mr. Hilts? A. Eleven.

(Testimony of Harold W. Hilts.)

Q. How many of those can you say are bounded by state boundaries? A. Just two.

Q. Those two are what? [127]

A. Washington and Oregon.

Q. Were you familiar with the granting of the Oregon territory by Paramount Pest Control Service? A. I was.

Q. To whom was it made?

A. To Mr. Brewer.

Q. Were you familiar with the signing of the franchise agreement, Exhibit 24, in this case as of July 1, 1946, between Paramount Pest Control Service and Mr. Brewer? A. Yes, I was.

Q. After the execution of that franchise, to your knowledge did the parties continue performance under that agreement? A. Yes, sir.

Q. When did you become aware that there was any change or difference in any phase of that, Mr. Hilts?

A. In December, 1946.

Q. How did you become aware of that?

A. Mr. Sibert told me.

Q. What was the change?

A. The change as was illustrated at that time I did not understand completely.

Q. It related to what phase of it?

A. Change of payment.

Q. Was there any other phase or provision of that contract that was changed? [128]

A. No, sir.

(Testimony of Harold W. Hilts.)

Q. What did you do with respect to accounting statements under this contract between July 1, 1946, and December 31, 1946?

A. Did you say under the change?

Q. No, under the contract itself?

A. I was here first in October, the 13th, the first time that I was here under the agreement that had been entered into on July 1, 1946, and I had submitted at that time, after going through the records and closing the books, a trial balance, a profit and loss statement and balance sheet, on the business entered on the records at that time.

Q. On what basis did you submit that statement?

A. The books are kept on a cash basis and the franchise, as it was called, the 20-80 agreement, was based on 20 per cent of the gross receipts.

Q. Paid to whom?

A. Paid to the Paramount Pest Control Service in Oakland.

Q. And the 80 per cent—

A. —was left for Mr. Brewer to operate on and to take home for himself.

Q. At the time you submitted the October statement, on what basis did you submit it? On the franchise basis or the 80-20?

A. Yes.

Q. Did you receive any resistance from Mr. Brewer in that regard? [129]

A. I did not.

Q. Up to the time you learned of the different arrangement from Mr. Sibert, had you rendered other statements on the 80-20 per cent basis?

A. Yes, sir.

(Testimony of Harold W. Hilts.)

Q. Had you received any resistance from Mr. Brewer? A. No, sir.

Q. The dollar-for-dollar arrangement, as it has been termed, expired when?

A. December 31st, 1946.

Q. When it came to the January and February statements, 1947, on what basis did you submit those?

A. I submitted those on the 20-80 per cent agreement that was in effect as of July 1, 1946.

Q. Was that termed the franchise agreement?

A. That was termed the franchise agreement.

Q. When did you submit those?

A. I took the figures off the books March 13th and had them in rough draft and had talked with Mr. Brewer relative to the business in general and showed him the figures, and then I took those figures back to Oakland with me and also a check accompanying the total settlement for those two months of January and February to Oakland.

At that time, in Oakland, I prepared or had prepared typewritten copies of my rough draft and mailed them back to [130] Mr. Brewer.

Q. Did you, during the month of January, 1947, have any conference or talk with Mr. Brewer?

A. Yes, sir.

Q. When was that?

A. Around January 20th.

Q. Where was that?

A. That was in Portland, Oregon, in our office in Portland, Oregon, the Portland office.

(Testimony of Harold W. Hilts.)

Q. What was the purport of that conversation?

A. As I remember it, we discussed the various operations of the business and made comments as to how it was progressing, and the books were, of course, closed for December 31st, and I took the figures that I had to have to send back at that time, and any additional information, and then we discussed the business as to how it was progressing, and then we probably brought up—As I recall, he mentioned something to me about having had an understanding relative to an adjustment as to the change of payment under the franchise.

Q. Had you understood it then, at that time?

A. I didn't.

Q. What did you do then?

A. I told him I didn't understand exactly what it was and that it was not clear to me.

Q. What did you do then? [131]

A. I left after that time and went back to Oakland.

Q. What did you do at Oakland?

A. Went through my regular course of duties.

Q. What did you do with respect to the understanding at the time?

A. I couldn't do anything about it because the understanding that he had was with Mr. Sibert and Mr. Sibert was not available at that time and, so, I couldn't contact him.

Q. Did you discuss it with Mr. Sibert when he was available?

A. Not until March 15th of 1947.

(Testimony of Harold W. Hilts.)

Q. Was there anything else in this discussion of January 20th concerning Eastern Oregon?

A. January 20, 1947?

Q. 1947, yes. Mr. Sibert testified about that. I don't know whether it had been brought up with you or not? A. No, it had not been.

Q. Then did you have any contact with Mr. Brewer during the month of February, 1947?

A. I was not in Portland and I had not seen Mr. Brewer during February, 1947.

Q. From your position as auditor in the Paramount Pest Control Service, do you know whether or not Mr. Brewer made any payments on his franchise—and when I say “franchise,” I am referring to the July 1, 1946, agreement—on the amount that he owed Paramount Pest Control Service? [132]

A. Yes, sir, he did. He made payment February 6 of 1947 in the amount of \$250.

Q. Did you enter that payment in your account?

A. Yes, they were reported on his records.

Q. Will you see if you can locate that in the file, the check which you describe as the February 6th payment? A. Yes, I have it here.

Q. What is the exhibit number? A. 30.

Q. Is there anything on that check that discloses the breakdown, what the payment was made for?

A. Yes. In our system of accounting, we have what we call the voucher system. The original copy goes to whomever it is made in favor of and the duplicate is retained in the office, and the duplicate

(Testimony of Harold W. Hiltz.)

is an exact copy of the original, because a carbon is necessary to put it on there.

Mr. Rankin: May I ask you to hand that to the Court?

The Court: I don't want to see it just now.

Q. (By Mr. Rankin): One copy you have?

A. Yes.

Q. Do the original and copy both disclose the items of the February payment, as made?

A. The original must have disclosed it, but the original has a division, which is known as the check proper and the remittance advice part. The remittance advice is torn off when the party [133] in whose favor the check or voucher is made payable deposits it, and the only part that we have left here in evidence is the check part and the duplicate voucher part shows what was on the remittance advice that has been torn off. It discloses "For franchise, \$250.00."

Q. What is the total of the check?

A. \$338.00.

Q. What is the balance, the difference between the \$338.00 and the \$250.00?

A. In this particular case it is \$88.00.

Q. What is it for, generally speaking?

A. Well, it is for supplies for December, \$28.87, auditing for December, \$25.00, and billing statements, \$34.13.

Q. Did you make a request of Mr. Brewer for this payment? A. I did not.

(Testimony of Harold W. Hilts.)

Q. Did you make any designation as to what it should apply on?

A. No, sir. He put that on there of his own free will.

Q. When it comes to the designation "For franchise, \$250.00," did you have anything to do with requiring that designation?

A. I never did, no.

Q. When was the next payment made by Mr. Brewer?

A. March 6, 1947. It is in the amount of \$250.00 and states "Apply on 1946 franchise."

Q. Was there any other item contained in that check except the franchise payment? [134]

A. No, sir.

Q. What you described as to the method of payment, as to the original and duplicate, particularly with reference to the voucher, applies to this check as well as the other?

A. Yes, it does.

Q. Were there any payments made by Mr. Brewer on the January and February, 1947, franchise account?

A. Yes, there was. There was a payment made to me on March 13th when I was in Portland, going through the records, making up the statements for January and February. That payment was in the amount of \$494.25 which completed the total amount of his liability to us under the franchise contract for January and February.

(Testimony of Harold W. Hilts.)

Q. It is claimed, as you well know, by Mr. Brewer that these payments were all on account of the franchise, as modified, meaning the change of payment on the dollar-home and dollar-company.

Was there anything in connection with those payments which could have been reconciled with that dollar-for-dollar agreement? A. No, sir.

Q. Is there anything in these payments that is reconcilable with the franchise provision of 80-20 distribution?

A. Yes, there is. The duplicate part of the voucher here reads, "Franchise balance for January and February," and then [135] it records the January and February franchise, \$994.25, and "Paid, \$500.00; balance, \$494.25," and that was the exact amount of his remittance to me.

Q. On what basis?

A. On the basis of the 20-80 per cent franchise contract for January and February.

Q. Were any of those payments made by Mr. Brewer under any complaint or protest to you?

A. Absolutely none whatsoever.

Q. When did you complete your review of the books, your investigation?

A. You say when did I what?

Q. When did you complete it?

A. March 13, 1947.

Q. The first two of these checks are in round figures, are they not? A. Yes.

(Testimony of Harold W. Hilts.)

Q. If I recall correctly?

A. Yes, they are. One was \$338.00 even and the other was \$250.00 even.

Q. With respect to the franchise payments, what were they?

A. \$250.00 was included "For franchise," but the next and second one was just for \$250.00.

Q. That left an odd amount for the third check?

A. That is correct. [136]

Q. How much was that odd payment to complete the total payment under the franchise for January and February, 1947? A. \$494.25.

Q. You probably said, but I don't recall: When did you complete that examination?

A. Of January and February?

Q. Yes, January and February.

A. March 13th.

Q. Then what did you do?

A. I went back to Oakland. Mr. Brewer took me to the airport, and we had our usual—well, conversation that, "Oh, well, things are going along fine" and everybody was happy, and so on. He often drove me out to the airport and watched planes take off the ground. I remember that specifically.

Q. Was there any complaint made by Mr. Brewer that you were not treating him correctly?

A. No, sir, not at all.

Q. Was there any protest or objection on his part as to making the payments that he had previously made or had made at that time?

A. No, sir. His attitude was to the effect that he knew it was due and he was going to pay.

(Testimony of Harold W. Hilts.)

Q. Did he at that time indicate that he was under the belief that the dollar-home and dollar-company agreement of September 12th was still continuing? [137]

A. No, sir, he didn't.

Q. When you arrived at these figures showing a total of \$994.25 due under the franchise agreement for January and February, 1947, did you go over that matter with Mr. Brewer? A. I did.

Q. When did you get the figures that you went over with him?

A. The figures were on his books. I took them off the records of the office for January and February. They represented the figures that are used in figuring the terms of the contract, commonly known as the franchise.

Q. Did he understand it as you went over it?

A. He certainly did.

Q. Who made the entries in the books from which you took them, if you know?

A. Mr. and Mrs. Brewer, mostly Mrs. Brewer.

Q. Then, upon your return to Oakland, what did you do, upon your return to Oakland in March of 1947?

A. I went through my regular procedure, having made a rough draft, and prepared it to be mailed.

Q. A rough draft of what?

A. Of my examination of his records for January and February, 1947, and then at that time I asked Mr. Sibert if he would clarify for me his agreement relative to his understanding with Mr.

(Testimony of Harold W. Hilts.)

Brewer for the period starting July 1st, 1946, to December 31st, 1946. [138]

Q. Did Mr. Sibert do so?

A. Yes, Mr. Sibert did so.

Q. You say you went through your regular procedure of preparing your accounting. Did you mail to Brewer a copy of your accounting for January and February, 1947? A. Yes, sir, I did.

Q. Can you state whether or not there is in this file such an accounting, this file of exhibits?

A. Yes, there is.

Q. What is that exhibit?

A. It is not in this exhibit file. Pardon me. Yes, it is. I think I recognize it here. No, I don't. It is not here.

Q. I hand you this second volume and ask you if you can locate it in there?

A. Yes, sir, I do.

Q. What is the number?

A. It is No. 57.

Q. Did you give Mr. Brewer credit in that accounting for the payment he had made by the check dated February 6, 1947, for \$250.00?

A. Credit was given to him on his books, and his book figures are recorded on here, yes.

Q. Did you make an accounting for February, 1947, also? A. Yes, sir.

Q. Did you deliver both of these when the January and February [139] accounting was done?

A. I was not here in February or January.

(Testimony of Harold W. Hilts.)

Q. Did you give him credit for the February payment of \$250.00 on the franchise in your February statement?

A. That was not recorded on the books because— Did you say in February?

Q. Yes.

A. I am afraid I don't understand that question. Yes, the \$250.00 payment that was made February 6th is recorded and he is given credit for that on his statement.

Q. Then, the balance of \$494.25, was he also given credit for that?

A. Yes, sir, he was. It is also a matter of record in his books.

Q. Were those entered on his records as well as your own? A. Yes.

Q. As relating to the amount of money due from Brewer to Paramount under the franchise of July 1, 1946? A. Yes, sir.

Q. Did you do anything else in relation to payments when you returned to Oakland in March, 1947? A. Yes, sir, I did.

Q. What did you do?

A. After understanding the agreement with Mr. Sibert, the agreement that Mr. Sibert and Mr. Brewer had entered into, which was [140] up to and including December 31, 1946, I then took the figures that we had for effecting an accounting on a settlement and prepared—Mr. Sibert and I prepared the figures together so that it would be right,

(Testimony of Harold W. Hilt.)

which was based on the "You take a dollar and I take a dollar" basis, and then mailed it to Mr. Brewer in Portland.

Q. Was there a letter of transmittal with that?

A. Yes, I wrote a letter along with that?

Q. What is the date of that letter?

A. March 15, 1947.

Q. What is the exhibit number so we will have it identified?

A. I don't have it here.

The Court: Take a short recess.

(Recess.)

Q. (By Mr. Rankin): Before the recess we were talking about Exhibit 29, which was your letter of March 15, 1947, to Brewer at Portland. "Enclosed is a statement of your account for 1946, also January and February of this year."

So as to expedite it, do you have the statement of your account for 1946 that was enclosed here?

A. No, sir, I don't.

Mr. Rankin: For the Court's information, at the previous hearing of this case in the Circuit Court Mr. Leo Smith gave that letter to Mr. Bernard and Mr. Bernard says he gave it back.

The Court: I have heard about that. [141]

Mr. Rankin: And we do not know where that is now.

The Court: Very well.

Mr. Rankin: Is that statement of January and February, 1947, in this list of exhibits?

A. Yes, sir.

(Testimony of Harold W. Hilt.)

Q. What is the number that appears?

Mr. Bernard: Did I understand Mr. Rankin to say that at the hearing in the Circuit Court he gave this statement of account for 1946 or this letter?

Mr. Rankin: No, the statement of the account and the letter. They are both together.

Mr. Bernard: No, just the letter.

Mr. Rankin: I wasn't there, then. I don't know anything about that. Mr. Bernard and Mr. Smith will have to finish that.

The Court: Don't argue about that.

Q. (By Mr. Rankin): Do you find that letter? That statement, rather? A. Yes.

Q. What is the exhibit number?

A. Exhibit 57.

Q. This letter (Exhibit 29) says: "You will note that this splits everything across the board for 1946 and we both come out with \$1,479.65 and you still have your \$1,000 investment in the business."

What did that indicate that the total revenue for 1946 was?

A. Well, the total amount that was split was \$1,479.65.

Q. The third paragraph says: "For January and February there is a net profit of \$1,016.55 with the franchise out of it, now you have drawn \$512.22 for both months"—

What franchise did you refer to when you said "the franchise out of it"?

A. I referred to the franchise that was in effect as of January 1, 1947, and the franchise that I re-

(Testimony of Harold W. Hilts.)

ferred to in this letter was based on the 20-80 per cent basis, which was for January and February of 1947.

Q. Then you say "now you have drawn \$512.22 for both months; if we take \$512.22 like you did that will be your franchise for January and February." What did you mean then by "franchise"?

A. I meant there that in the discussion that I had with Mr. Sibert down in Oakland March 15th, at the time this letter was written, that there was a thought brought to my mind by the Eastern Oregon venture was not as profitable as we had considered that it would be, and, on the basis that it was not profitable, I had suggested to Mr. Sibert that we, in trying to help Mr. Brewer, show him that we were in favor of trying to keep the man going and so he could make a supreme success of the area, without financial responsibility on his shoulders, that we would be willing to take for January and February the same amount that he took up to December 31st, 1946, and incorporated [143] that in this letter.

Q. Did Mr. Brewer make that request of you?

A. He did not.

Q. Was there any suggestion by Mr. Brewer to that effect in consultations or conferences you had with him in March or at any other time?

A. No, sir.

Q. Was it agreed to and this notice sent before Mr. Brewer was aware that it was to be done?

(Testimony of Harold W. Hilts.)

A. Please state the question again. I didn't get it.

Q. Was this agreement of yourself and Mr. Sibert to divide this January and February, 1947, return on the basis of the dollar-home dollar-company done before Mr. Brewer knew anything about it?

A. Yes, sir.

Q. "Now you have paid \$994.25 as franchise for January and February which is \$482.03 over your January and February franchise." What did you mean by that, "over your January and February franchise"?

A. I meant that it was over the payment on the basis of the 20-80 per cent of the \$994.25 which was in effect for January and February and, therefore, according to the terms of the agreement that he had with Mr. Sibert.

Q. Your letter continues: "* * * as per above figures, this will be credited to the \$1,479.65, which leaves \$997.62 which [144] will wipe off 1946."

How much had he made in 1946?

A. How much? I don't understand that question.

Q. What had he made in 1946, do you know? In other words, what did this \$1,479.65 refer to?

A. That refers to the dollar-for-dollar agreement; in other words, \$1,479.65 was his portion, and we would get \$1,479.65 for 1946, from July 1st to December 31st.

Q. How was it paid?

A. It was never paid.

(Testimony of Harold W. Hilts.)

Q. Was it paid by this?

A. No, sir, that didn't apply in 1946. The payments that he made applied on January and February.

Q. Maybe it is my fault that I do not understand this, Mr. Hilts, but it says here, "This will be credited to the \$1,479.65." Where do you get the \$1,479.65?

A. That was the statement that was attached to the letter.

Q. Was that due from Brewer to Paramount?

A. That is correct.

Q. What for? What was the basis of that obligation?

A. On the change of payment basis he had with Sibert, and it was due for the period July 1st to December 31st, 1946.

Q. That is what I understood. I didn't know that you gave that. It is the contention by Mr. Brewer that this business was in a very poor condition and that he put it in a good condition, [145] this agency here, and he said something to the effect that when he took over this business it was in the red. Is that true?

A. No, sir.

Q. Do you know what the amount of earnings of this Oregon branch were prior to, at the time of, and immediately subsequent to Mr. Brewer's taking over in Oregon?

A. I will have to go back to 1945 to bring that out and show you the comparison.

(Testimony of Harold W. Hilts.)

During 1945 we never lost money up here in Oregon, which was--We never lost money up here in Oregon with the exception of one month, which was the month of December.

Q. What year?

A. 1945. At that time the loss was only about \$22.00. I don't remember the exact figure.

In January and February and March of 1946 we also made money, and we have had a statement prepared on that basis. I believe I turned those over to you.

In April and May after Mr. Brewer came to this area, the records show that we absolutely lost money. Then, again in June, it started to pick up again.

Q. Up to the time Mr. Brewer took control, was there any loss? A. No, sir.

Q. Immediately afterwards, for how many months was there a loss? [146]

A. For a--For two months after that.

Q. Then, after that, did Mr. Brewer start to make money?

A. Then he had started to show a little gain.

Q. Up to December, then, 1946, December 31, 1946, when this amount that you describe in your letter was due? A. That is correct.

Q. You go on and say, "Ted tried to explain this to me just before I came up this last time, but I didn't get it." That has reference to what?

A. That was in reference to the agreement that he had had with Mr. Brewer September 12, 1946.

(Testimony of Harold W. Hilts.)

Q. "Regarding Brooks and Ahern—" Who were they?

A. Mr. Brooks and Mr. Ahern were servicemen and salesmen that were involved in the Eastern Oregon extension campaign.

Q. " * * * We will split this the same." What did you mean by that?

A. The understanding there was that we would take the expenses and split them in half and we would take any income derived from this venture and split that in half, and we would both bear half of the burden; the company would bear its half and Mr. Brewer would bear his half; and, if there was a profit, that would be split; if there was a loss, that would be split.

Q. What actually happened under that agreement? A. It was a loss.

Q. What was done? Were there any moneys received at all from [147] the business?

A. There were, and the income came into the Portland office and we paid the expenses. To begin with, it was one of those deals where we got the bad end of the deal until we had a settlement.

Q. What became of the money that was paid in?

A. Mr. Brewer got it.

Q. Have you been paid any of that?

A. No, sir.

Q. What became of the expenses that you incurred? A. We paid them.

Q. Did Mr. Brewer compensate you?

A. No, sir.

(Testimony of Harold W. Hilt.)

Q. When, after March 15, did you again come in contact with Mr. Brewer in relation to this business between Paramount and Brewer?

A. In April.

Q. What time?

A. Oh, the first part of the month. I don't remember the exact date.

Q. What was the subject of that discussion?

A. It was carried on on the same basis as we have always operated. I had asked if he had received his letter of settlement and I think he said yes; he seemed to be satisfied with it, and I went ahead and prepared my examination of his records, closed them, prepared my profit and loss and balance statements and took them back to Oakland and sent them back to him.

At that time he also saw me off at the airport. He transported me back and forth from the airport and our relationship was of the best.

Q. When did you next see Mr. Brewer?

A. In May, 1947.

Q. At what time?

A. Around the 14th or 15th.

Q. What was the occasion? What was discussed in relation to this business then, if anything?

A. Just the same procedure. We went right along on the same basis.

Q. When did you next see Mr. Brewer?

A. In June, June 17th of 1947.

Q. Where?

(Testimony of Harold W. Hilts.)

A. I saw him here in Portland, and at that time Mr. Sibert accompanied me on the trip. We both were together with Mr. Brewer in the office here and went over the affairs of the business.

Q. When did you next see Mr. Brewer?

A. July 9, 1947.

Q. What was the occasion?

A. At that time I went ahead with my regular procedure and also prepared a settlement. We had an understanding, Mr. Sibert, Mr. Brewer and myself, back in June of 1947; we had an understanding [149] where he would request that we allow our settlement of the accounting on the franchise to run for the fiscal year which would be from July 1 of 1946 to June 30 of 1947, and we mutually agreed to that.

Back in June we also set forth a budget for the business, as the way the figures were on the books, stating absolutely the expenses that were involved and the income. Mr. Brewer had \$3,000 business, monthly business, on the books.

Q. I will come back to that in a moment. When did you next have any conference with Mr. Brewer?

A. July 9, 1947.

Q. After July 9th?

A. The next time I saw Mr. Brewer was July 31, 1947.

Q. That was after the termination or about the termination?

A. That was after we had received the letter in reference to terminating his agreement with us.

(Testimony of Harold W. Hilts.)

Q. From July 1, 1946, to and including the conference and meeting of July 9, 1947, had Mr. Brewer expressed to you any intention of terminating this relationship between the Paramount and himself, disclosed by this agent's agreement?

A. No, sir, none whatsoever. As a matter of fact, our relationship was pretty much on an even keel all the time. There was never any mention made relative to dissatisfaction. In fact, I had made different recommendations to Mr. Brewer, as I do when I am in the territory, because of my knowledge of the business, [150] because I am also a licensed operator and I understand the outside operations as well as I do the accounting.

Q. Did Mr. Brewer indicate that he wanted to terminate this relationship at any time?

A. He certainly did not.

Q. Did he indicate to you that there was a desire on his part to get a different adjustment that he was insisting on with respect to pay, other than what you had granted?

A. No, sir.

Q. Have you, Mr. Hilts, stated fully the description of the relationship that existed between Paramount Pest Control Service and Mr. Brewer during that whole year? Is there anything you can add to what you have said about your relations?

A. Why, I believe that while I was talking about the June 17th trip there was an item that I had not related, which was to the effect that Mr. Brewer had said he had contacted the bank that he was doing business with here and he wished to be

(Testimony of Harold W. Hilts.)

able to let them know how he was getting along in his business, and he requested that we prepare a statement as to the operations. As he put it, the bank said that they wanted to know just exactly what the situation was as to his personal and business affairs, which is according to banking procedure, and at that time we prepared a rough draft and went down to the bank, Mr. Sibert, myself and Mr. Brewer, and with the express purpose of trying to get him acquainted with the bank and his position with the [151] bank—the banker happened to be Mr. Ridehalgh, of the California bank, I believe it was, or the Bank of California, I don't know which it is,—and he at that time listed all the operations of Mr. Brewer and the Paramount Pest Control Service.

Q. Did Mr. Brewer then tell the banker in your presence, or did he tell anyone, that he was dissatisfied with the treatment he was getting here, that the treatment he was getting was not proper or that the compensation he was receiving was not adequate?

A. No, sir, not at all. May I go on to say that at the time of the June 17th conference which you asked me about——

Q. I was just coming to that now. Will you please refer to that particular occasion and tell what transpired and what was said between the representatives of Paramount, Mr. Sibert and yourself and Mr. Brewer?

A. During that time, after I was completed with the records, closing the business up to and

(Testimony of Harold W. Hilts.)

including May 31st, 1947, we sat down and made a budget from the figures in his records, and that budget proved, being based on the amount of business that he had, that he had over \$3,000 worth of monthly business, that he could keep his franchise and pay all his bills and keep his territory in operation and come out with \$855 a month, in round figures and Mr. Brewer's own words at that time was to the effect, "Well, that being the case, I can't afford not to be on the 20-80 per cent franchise basis because I will make more money that way than I would the other way." Whereas, we would [152] only be getting \$600 out of it, he would be getting \$850, and that is not uncommon in our business.

The Court: What is not uncommon?

A. It is not uncommon in our business for a territory agent to receive more compensation on the franchise basis than they would receive on the 20 per cent.

The Court: Do they usually get about that, right around \$10,000 a year?

A. We have had operators earn more than that, sir.

The Court: What is your gross business, about?

A. You refer to all our operations?

The Court: That is right.

A. Well, it runs upwards of probably \$700,000.

The Court: A year?

A. Yes, sir.

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(Testimony of Harold W. Hilts.)

The Court: Increased pretty rapidly, has it?

A. Well, it has a pretty steady growth now. It increased rapidly during the war, as most businesses did, but we still have not dropped down. We are increasing.

The Court: A very profitable business?

A. A very profitable business, if it is run right, yes.

The Court: Highly profitable, at that rate?

A. That is correct.

Q. (By Mr. Rankin): Your franchise calls for an 80-20 distribution, [153] respectively, between agent and company?

A. Yes, sir.

Q. What do you estimate, in general, it costs to process or serve these contracts, with the expenses paid by the agent?

A. 60 per cent, average. In other words, that is the basis on which the franchises are drawn.

Q. So, that leaves 20 per cent for the agent and 20 per cent for the company?

A. That is correct, sir.

Q. 20 for the company is fixed, is it not?

A. Yes, sir.

Q. And is the 20 per cent for the agent fixed, or can he vary that 20 per cent by his method of operating the territory?

A. He can definitely vary that by his method of operating.

Q. What are some of the figures that are less? How much less than 60 per cent does an agent use in operating his territory?

(Testimony of Harold W. Hilts.)

A. Do you mean how much more than 60 per cent?

Q. How much more and how much less? If he operates at less than 60 per cent, he gets that difference, doesn't he? A. That is right.

Q. How far down below 60 per cent do agents go? A. It can go as low as 45 per cent.

Q. Sometimes if an agent is not a particularly good operator, how much more than 60 per cent does it cost him?

A. It can run as high as 75 per cent operation.

Q. Going back to the June 17, 1947, conference, was there anything else that was said at that time between Mr. Brewer and you and Mr. Sibert, that you have not related?

A. Yes, there was. Mrs. Brewer was in San Francisco or Sunny Hills, California, and, when we found that out, Mr. Sibert and Mr. Brewer and myself—While Mr. Brewer was taking us to the airport, why, Mr. Sibert got the idea probably he would like to go down and see his wife.

Q. Is that the same transaction or occurrence Mr. Sibert testified about this morning?

A. Yes, sir.

Mr. Rankin: Well, we won't repeat it.

The Court: Whom do you blame for all this trouble, Mrs. Brewer? Is that what you were leading up a minute ago?

A. I didn't make any contention about it, no, sir.

(Testimony of Harold W. Hilts.)

The Court: Did you hear some remarks she made down there?

A. No, sir. You mean that is why I started to relate that?

The Court: Yes.

A. No, sir.

Q. (By Mr. Rankin): Do you have anything to say about the collections here that has not been said?

A. Well, I noticed that the balances that were due Mr. Brewer that the customers owed him kept crawling up each month; in other words, they were not collected, and I would keep referring to it, and at the end of June there was a balance of over [155] \$3500—\$3600—on the books.

A. As I recall, the contract, which is here and which speaks for itself, makes him responsible for those collections?

A. That is correct.

Q. That is, they were to be made by Mr. Brewer?

A. Yes, sir.

Q. Did he make those collections you are talking about?

A. He eventually collected all he could get out of the business; in fact, he collected everything, and then drew it out of the bank.

Q. Just describe what you mean by that. What was his process?

A. Well, he knew that he had to clear his accounts receivable by the medium of showing payment by the collection that he made on those accounts receivable. Therefore, he could not just

(Testimony of Harold W. Hilts.)

collect the money and stick it in his own pocket, figuring that it was his. He had to run it through the books, so he would run it through the books. Then he would turn around and draw a voucher or check and put it in his own personal account or do whatever he wanted to with it.

Q. Let us turn to some of these items that we are claiming here, Mr. Hilts.

The Court: Are you going into the question of damages?

Mr. Rankin: Yes.

The Court: Put that off for awhile. Let us try the other feature. Let us try the equity feature of this case. [156]

Mr. Rankin: All right, your Honor.

Q. Did you cover everything now that occurred in the June 17, 1947, meeting or conference?

A. Yes, sir, except that you stopped me when I was relating the conversation.

Q. That is the same thing Mr. Sibert testified to?

A. Yes.

Q. So there is no need to repeat it. Now, then, you spoke of an accounting in July, July 9, 1947.

A. Yes.

Q. How did you prepare that accounting?

A. Well, that was prepared on the basis of "You take a dollar, we take a dollar."

Q. And why was that done?

A. Because Mr. Brewer had requested that we run it up to the fiscal year, as I mentioned in my

(Testimony of Harold W. Hilts.)

previous testimony, and asked that we wait until the end of June, June 30th, to make settlement.

Q. Did you agree to do that? A. We did.

Q. At his request? A. Yes, sir.

Q. State for what period that compromise or adjustment covered?

A. Covered from July 1, 1946, to June 30, 1947.

Q. Did you prepare a statement for Brewer in connection with the accounting on that basis for that year? [157] A. Yes, sir, I did.

Q. Is there a copy of it in evidence?

A. Yes, there is.

Q. What exhibit number is it?

A. Exhibit No. 36.

Q. Did you show these figures to Mr. Brewer?

A. Mr. Brewer helped me compile them. As a matter of fact, we spent over two hours on it together.

Q. Where did you and Mr. Brewer get the figures from?

A. Most of them were taken from his records. Some of them were in invoice form that were not entered on his records.

Q. Then what was said by you and Mr. Brewer with respect to this accounting of July 9th?

A. Prior to the time we started to effect this accounting, Mr. Brewer had a notion that we were going to make an accounting as of June 30, 1947, and I told him after I had prepared my examination of his books up to June 30, 1947, we were going to sit down and effect a settlement, taking in the

(Testimony of Harold W. Hilts.)

fiscal year's operations, and I told him that we were going to settle it, and he agreed that we should settle it if I had to stay a week to do it. Thereafter, we sat down and started to work on the figures.

Q. What did you do? Just go ahead and state what was done in the compilation of this accounting, please?

A. To get our dollar-for-dollar agreement, we took the accounts [158] receivable that he could collect, money that he could get; we took the asset investment that had not been charged into the records as expenses; took the cash on hand in the bank which was recorded against the expenses of operation, that is, left after the operation, and then we also recorded the amount of money that Mr. Brewer himself had drawn for that period of time, and added those figures.

Then we had some bills that were on hand that had not been paid as of June 30th, because the books were operated on a cash basis, and they were not set up in accounts payable and, therefore, they were due. We subtracted that figure.

Then we took half of the expenses of the Eastern Oregon run and subtracted that figure.

Then we took the bills that Mr. Brewer had owed Oakland, which were accrued and some of which were even involved in the settlement or accounting on the settlement as of December 31st, and we subtracted that figure.

Then the total was split in half. That would give us the exact figure, the real amount that there was

(Testimony of Harold W. Hilts.)

left, including Mr. Brewer's drawings and everything in the business.

Then we took one-half of the Eastern Oregon run that had not been paid us that year, and we added that, which was due us.

Then we subtracted half of the amount paid a man by the name of Torrach, wages for the period for which he was hired, [159] and gave him credit for that.

Then the statement goes on to show one-half of the amount of the franchise that was paid, based on January and February of 1947, and we gave him credit for that, and then we show the overdue bills that was owing to Oakland, and we added that.

That was the figure I referred to as part of it being in 1946, because we had that money coming. We had never been paid that money, and it was justly ours.

Then there was a piece of equipment known as "Hi Fog" that had not been paid for, which would become an asset on his records, and he owed us for it, and we charged that to him.

We took the total figure and Mr. Brewer agreed upon it, so much so that he gave me a check in payment of part of this settlement.

Q. What was the total that he owed, according to your joint understanding? A. \$3,359.61.

Q. What amount did he pay?

A. He paid \$259.61, leaving \$3,100, in round figures.

(Testimony of Harold W. Hilts.)

Q. Was there any discussion of the payment?

A. There was not, and we went on, after we had agreed upon it, and I asked him how he wanted to pay it off, and he said, "Well, I will see how the money comes in. As the money comes in, I will be glad to, naturally, pay it off, as long as it doesn't hurt [160] the business," and we accepted it that way and agreed upon it.

Q. Why didn't he pay the total amount, \$3,359.61?

A. He didn't have that much, although there was that much and more represented in his books and assets and inventories. He didn't have that much cash on hand.

Q. Was there anything said why he should pay that odd amount?

A. No. That was his way of wanting to do it, and I accepted it that way. In that I was in every way trying to make him feel that there was no pressure being brought to bear on him at all. That was his own figure, his own idea, and I accepted it.

Q. Was there any indication on July 9th, when you had this conference with him, that he was going to cancel his contract thirteen days later?

A. No, sir, none whatsoever. When we received his letter in our Oakland office, it was like a bomb-shell in our camp.

Q. What did you do after you received that letter? By the way, going back to that statement, which exhibit is that? A. 36.

(Testimony of Harold W. Hilts.)

Q. Did he make any endorsement on it?

A. Yes, he did. He set forth the check number and the amount that he paid on it, making a record of that, so he could keep track of it.

Q. Is that endorsement in his own handwriting?

A. That is in his own handwriting. [161]

Q. What does it say?

A. It says "July 9, 1947, paid, Check Number 413, \$259.61."

Q. When did you next come in contact with Mr. Brewer? When did you next come in contact with Mr. Brewer after the receipt of his letter of July 24, 1947?

A. The next time I saw Mr. Brewer was July 31st, 1947.

Q. Whereabouts was that?

A. In Portland, Oregon. I was registered in the Roosevelt Hotel at the time, and Mr. Brewer came up to the hotel. He knew, of course, that I was in town, and when he came into the hotel room my first words to him were, "Well, Charlie, what in the world happened?" And he says, "Well, I don't know; just couldn't seem to make it go," and so he said——

I said, "Well," I said, "what are you going to do?" And he said, "Well, she is all yours, if you want it." He said, "Tomorrow you come down and we will take an inventory and I will give you these supplies," and we had a general conversation along that line, and so I asked him where I could get in

(Testimony of Harold W. Hilts.)

touch with Mr. Rightmire and he said, "I don't know exactly where he lives," and I said, "Well, can't you give me his address? Isn't it in the office?"

"Yes," he said, "I will get it for you. I will get it at the office on my way home. I will get it for you and call you up and give it to you on the telephone." [162]

I said, "I would like to see him tonight, if I could," and he said, "I don't know. I don't think it will do you much good to see Mr. Rightmire. Rightmire isn't going to stay in the exterminating business any more. Rightmire is sick."

I said, "Well, if, as you say, he is sick, I would like to go, as a company representative, and see him and tell him we are sorry about his sickness, and be interested in general because he is an employee of ours."

He said, "Well, I owe Mr. Rightmire a vacation." And he said, "He is through. He isn't going to work any more."

So I said, "Then, if you will give me his address, I will appreciate it," and he said, "I will stop at the office."

I waited for over an hour, which was more than ample time for him to arrive at the office and obtain the address, and I didn't hear from him, so I made a call to his home and asked him what had happened.

He said, "Well, I couldn't find the address," so I said to him, "Well, I understand you were going to at least let me know," and he said, "Well, I was going to call you up while I was eating dinner," so

(Testimony of Harold W. Hilts.)

I said, "Well, that is fine," and hung up. There was no more conversation at that time.

I found out later that his address was in the records and that it was in a little slide telephone file that was in the office, and so I obtained it myself and saw Rightmire the next day. [163]

Q. What was your conversation with Mr. Rightmire?

A. I went out to his house, and we sat out front talking, and he told me that he thought Mr. Sibert was one of the dirtiest guys he had ever talked to or seen and that he wouldn't have any part of it, and that he never realized what a dirty louse he was, and, of course, that made my blood boil, because I had been associated with Mr. Sibert for some time, twelve or fourteen years; had known him prior to my association with the business. He went on with that conversation. He said he would not work in the extermination business for anybody. He said, "I am through."

I said, "What are you going to do?" And he said, "I don't know what I am going to do." He said that.

"Well," I said, "you are really not interested at all?" And he said, "No, I'm sick. I am not going to work at all. I have had to take treatments from my doctor and I am, in general, run down. I have been working too hard for Brewer, and I am run down. I don't know what I will do. Maybe I will get something, as I have had some previous selling experience."

(Testimony of Harold W. Hilts.)

We continued the conversation in general, and then he reiterated that he would not have any part of Paramount or any of its organization at all; he was entirely through and said that there was no reason in the world for him to work for an outfit that would do things like Brewer or Paramount, or like Paramount, had done, and so then I said, "Well, you are not [164] going into business at all? Then I can't offer you the proposition that I had in mind when I came out here," and he said, "No, I am not interested at all."

Q. When did you know he was working for Brewer?

A. We found that out, well, the third or fourth day of August, on contacting our accounts, through men that we had to bring into this area to protect our business, because we operated on a monthly service basis, and there is so much business that has to be done and so many men have to do it, and, as we understood one fellow, we did not have any organization and our customers knew we did not have any organization; in fact, we were supposed to have been liquidating, which was news to us.

While we were contacting our customers, our men would run into these service slips of Brewer's and, in some instances, Mr. Rightmire's name appeared, indicating that he had serviced them.

Q. Did you ever discuss the matter with Mr. Rightmire again?

A. I never did. I have never seen him since.

(Testimony of Harold W. Hilts.)

Q. In respect to Mr. Duncan, did you have any conversation with Mr. Duncan prior to August 1, 1947?

A. Yes, I saw him during the time that I was here on the 31st.

Q. The 31st of what?

A. July, 1947. He came down to the warehouse with Mr. Brewer on one occasion.

Q. When did you learn that Mr. Duncan had gone with Mr. Brewer? [165]

A. Not until later on, because Mr. Duncan was supposed to have taken a trip back East or the Middle West and then come back out here so, if he was going to work for Mr. Brewer, according to all I can find out, that made the earliest date around August 20th, or thereabouts.

Q. Had Mr. Duncan at any time during 1947 indicated to you any dissatisfaction that he had with the company? A. He did not, no, sir.

Q. What was the nature of your relationship with Duncan during 1947 or any other time, prior to August 1, 1947?

A. Mr. Duncan had always had a good relationship with me, as with all—as I have with all of our employees.

Q. Was that true of the relationship with the company? A. Yes.

Q. Do you know of any time when he had spoken of Mr. Sibert or any other member of the company as Mr. Rightmire had spoken of Mr. Sibert?

A. No, sir, I don't.

(Testimony of Harold W. Hilts.)

Q. How about Merriott?

A. I had a conversation with Mr. Merriott Saturday morning. He was working on his car.

Q. What Saturday morning?

A. Of August 1st. He was working on his car in back of Mr. Brewer's home, and at that time I talked to him and asked him if he wanted to continue to work for Paramount Pest Control [166] Service and he said, "Sure, I will work for anybody that will give me a job."

I said, "Well, I think we can offer you a good job," and he said, "Well, I will be there." I said, "Well, when will you show up?" And he said, "I think I will have my car finished so I can be on the job Monday morning."

I said, "That being the case, we will look for you Monday morning," and he said, "That is okeh by me. I will be there," and, of course, Monday he didn't show up.

Q. Had there been any indication on Mr. Merriott's part prior to that time as to whether or not he was dissatisfied in any manner as a Paramount Pest Control Service employee?

A. None that I could notice at all.

Q. Did you have any conversation with Mrs. Rosalie Brewer, the wife of Charles P. Brewer?

Mr. Benard: When?

Mr. Rankin: During the month of July.

A. No.

Q. July, 1947?

A. July of 1947? I didn't see Mrs. Brewer at all.

(Testimony of Harold W. Hilts.)

Q. You ultimately ascertained, did you not, that Mr. Brewer, your agent, and Mr. Duncan, Mr. Rightmire and Mr. Merriott, who had been your employees and operators, were all leaving your company? A. Yes, sir. [167]

Q. And Mrs. Brewer, who had kept the office, was leaving with her husband?

A. That is correct.

Q. Was there anybody left in your organization here in Portland?

A. There was not. We had to transport men from Washington and California into this area, at great expense to us, to get them to contact our customers. We even had to bring supplies and equipment into the area. I had ordered it ahead of time because Mr. Brewer, after saying that he would turn over to me the equipment, as per his franchise agreement, on termination, that he would turn over to me his supplies and equipment—I left it at that until I tried to get them on Saturday morning, August 1st, at which time he refused me entry into his warehouse and instructed the man, Mr. Celsi, with whom the lease was signed, not to allow me to go in there at all, even after he had turned over the key to me to that warehouse, and said that I had no business in there, and there was a little bit of a scene at the time, at which time we stated to Mr. Celsi—Mr. Fisher and I were there, and Mr. Brewer and Duncan were there together, and I said, “We will abide by Mr. Brewer’s request and we will not touch the warehouse or try to gain entry to it until he requests it himself.”

(Testimony of Harold W. Hilt.)

Q. How long did you stay here at that time?

A. I was here about three weeks.

Q. During that three weeks what were you doing? [168]

A. Checking the supplies, trying to help organize the men that were then sent here and, in some cases, contacting a few of the customers, former customers. I found out they were former customers; because of Mr. Brewer's action, they were not our customers any more. Managed the business in general.

Q. Did you get any inventory from Mr. Brewer of the articles that had been here in the Paramount Pest Control Service?

A. Mr. Brewer and I took inventory together.

Q. What happened to that?

A. That was retained in the files.

Q. What did it disclose as to whether or not you had been delivered all the equipment that you were to take?

A. Well, when I realized what had happened, as per good business judgment, I took into consideration that probably I did not have all the inventory. I did not think I had a complete inventory and, so, I requested to go out to his house with him. At that time I went out to the house with him and we picked up various little items and some chemicals and some things like that, and he had told me at that time there was a little piece of spray equipment, which is foreign to our type of operation, and he said he had purchased that himself, or he had made a down payment on it, but he had—or he had bor-

(Testimony of Harold W. Hilts.)

rowed it—and he had turned it back. I left that in his possession, as far as that is concerned.

Of course, he refused to turn over any of the equipment [169] after that time which was in the warehouse. As a matter of fact, the actual situation was this, that, after he gave me access to the warehouse and the office, then, when I tried to get some equipment out of it is when I ran into trouble with Mr. Celsi, the owner of the warehouse, and he would not allow me entrance until Mr. Brewer had come down, and I did notice, when Mr. Brewer came down and checked the equipment later, that there was equipment that was not there that he had shown on the inventory, indicating that he had taken it out and was bringing it back, when he finally agreed to turn it over to us. His excuse was—it was quite an involved story.

These supplies and equipment, or the equipment in this particular case, that he had brought back, which were missing upon my second investigation of the warehouse, he said was used to spray some insects that was in Mr. Earl Merriott's home, but the complication of that is that Mr. Earl Merriott was supposed to have been on a hunting trip and he was still supposed to have been spraying his home with this equipment.

Q. How about the chemicals? Do you have any record of the chemicals, as to whether or not Mr. Brewer took any of the chemicals?

A. I wouldn't know, because I did not search his premises. I didn't think that was my right.

(Testimony of Harold W. Hilts.)

Q. You don't know whether or not any other department of Paramount Pest Control Service furnished him with any particular [170] poisons which were not returned to Paramount later?

A. I didn't get your question, Mr. Rankin.

Q. I had reference to whether you had knowledge that some other departments of Paramount Pest Control——

A. Oh.

Q. ——some other agency had furnished him with any materials?

A. Mr. Osborn from Seattle, manager and agent, had sent him, just previous to this time—I say just previous to this time; a matter of a few days—some Compound 1080 that he had borrowed from Mr. Brewer at an earlier date.

Q. Do you know what quantity that was?

A. Yes, he returned him three cans.

Q. Is that 1080 the item Mr. Bushing described as being very difficult to get?

A. Yes, sir.

Q. And being very lethal in its qualities?

A. That is the product, yes.

Q. Three cans. What is the size of those cans?

A. They are eight-ounce cans.

Q. How long would three eight-ounce cans last, ordinarily?

A. Depends upon how much business a man did with those three cans. It could last a year.

Q. Do you know whether or not Mr. Brewer was doing business as a pest control business under any assumed name?

A. Yes. [171]

(Testimony of Harold W. Hilts.)

Q. When did you learn that?

A. Immediately, on the 3rd or 4th of August.

Q. August 3rd or 4th? A. Yes.

Mr. Rankin: I think all this matter here is of record, your Honor. I will expedite it I think by simply calling the attention of the Court to it.

Exhibit 46 is the assumed business name certificate, sworn to by Rosalie Brewer before H. K. Phillips, Notary Public, acknowledged before H. K. Phillips, Notary Public, I should say, and recorded in the records of Multnomah County, Oregon, and attached to this is the following certificate by Al L. Brown, County Clerk: “. . . do hereby certify that the above copy of assumed business name certificate is a correct transcript of the original, as the same appears of record and on file in my office and in my custody.”

Then there is, as Exhibit 47, a certificate of retirement, reading: “Know All Men by these presents that Rosalie Brewer, the undersigned who have (sic) heretofore been conducting the business of Pest Control under the assumed name or style of Brewer's Pest Control and who have (sic) heretofore filed a certificate of such assumed name with the Clerk of the County of Multnomah, State of Oregon, have (sic) retired from the said business and no longer have (sic) any interest therein.

“Witness our hands and seals this 27th day of August, [172] 1947,” and signed “Rosalie Brewer.”

On that same date, referring to the 27th of August, 1947, the following certificate of assumed busi-

(Testimony of Harold W. Hiltz.)

ness name was filed: "Know All Men by These Presents, that the real and true name and post-office addresses of the persons conducting, having an interest in, or intending to conduct the business of pest control under the name or style of Brewer's Pest Control, at 4929 N. E. 28th Ave., Portland 11, Oregon, County of Multnomah, State of Oregon, are the following, to wit: Charles P. Brewer, Postoffice address 4929 N. E. 28th Ave., Portland 11, Ore."

All three of these certificates, two of assumed name and one of retirement, are duly certified by the County Clerk as being certificates on file in his office.

Q. (By Mr. Rankin): Now, Mr. Hiltz, you have stated briefly that you found that Mr. Brewer was taking over some of the customers of Paramount Pest Control Service. Tell what you did in regard to that investigation.

The Court: Lay that aside. I would like to hear the cross-examination now on what he has already testified about.

Mr. Rankin: Yes, your Honor. All right.

Cross-Examination

By Mr. Bernard:

Q. What contact did you have with Mr. Brewer at the time you came to Portland? Strike that. What contact did you have with Mr. Brewer up to the time you came to Portland in April, 1946? [173]

A. Oh, I had seen him in the office.

(Testimony of Harold W. Hilts.)

Q. You did not discuss any of the formulas in any way, anything like that with him, did you?

A. No, sir.

Q. When you came to Portland in April, 1946, did anybody else come along? A. No, sir.

Q. You came up to help him set up a set of books? A. The books were already here.

Q. What did you come up for?

A. We came up to assist him with the territory and get him acquainted with the operation of the area. Mr. Brewer had never been in a position to know these things.

Q. How long were you here?

A. Oh, it was a week or ten days.

Q. You had not discussed any of the formulas of the company with him?

A. Oh, we discussed certain things of operation, certainly, such as how certain things were being used, and I assisted him in some questions that he had asked and also gave him some advise as to what had been my experience.

Q. In the extermination business?

A. Right.

Q. What contact did you have with him after that, during the year 1946, if any? [174]

A. I saw him the next time May 5, 1946.

Q. Maybe I can bring it out this way: When were you informed by anybody that the contract or franchise was being modified as to the matter of payment? A. In December, 1946.

(Testimony of Harold W. Hilts.)

Q. December, 1946? A. Yes.

Q. Who informed you as to that?

A. Mr. Sibert.

Q. Did he tell you what he had agreed upon?

A. Did he tell me?

Q. Yes. A. Yes.

Q. Did he tell you the date when he had agreed upon it?

A. He told me it was in September, September 12th.

Q. He had never mentioned it to you up to that time? A. No.

Q. You testified as to some conversation you had with Brewer January 20, 1947. Did Mr. Brewer tell you at that time that it was not his understanding that this change in the basis of payment was to continue after January 1st,—

A. No, sir, he did not.

Q. What did he tell you at that time?

A. There was no specific mention of that.

Q. I understood you on direct examination to say that on [175] January 20th he told you that there was to be a rearrangement as to percentages?

A. That was up to December 31st.

Q. When did he send—When, rather, did you send him this statement? A. March 15, 1947.

Q. Maybe I can make it clearer. Maybe I had better make it clear. When did you send him the statement showing the January and February payments made at that time on the 20-80 percentage basis? A. At that time, March 15th.

(Testimony of Harold W. Hilts.)

Q. Didn't you give that to him earlier than that?

A. Not on January and February, no sir. I had let him see my rough draft, but I didn't give him his statement.

Q. You say you let him see your rough draft,—where? A. In Portland.

Q. That showed the division of the profit 20-80 under the franchise as written?

A. It covered the franchise due, yes.

Q. On what date did you show him that?

A. March 13, 1947.

Q. What did he say to you?

A. He said, "Well, that is fine," and he made a payment to me.

Q. What did he say to you about it?

A. Nothing at all. [176]

Q. Well, how did it happen that two days afterwards you sent him this letter, changing that arrangement and putting this on a different basis?

A. That was of my own free will.

Q. You mean to say you changed it of your own free will, without any suggestion from Brewer?

A. Absolutely.

Q. And without explaining to him why you were doing it?

A. I didn't have to explain it to him. He understood the settlement, as I found out later myself, about the December 31st settlement, and it was understood by him. I didn't need to explain it to him.

(Testimony of Harold W. Hilts.)

Q. As I undersand it, you claim on March 13th you had rendered him a statement for January and February, made up on the 20-80 per cent basis?

A. Yes, that is right.

Q. And he made no objection to it?

A. He did not. He made a payment.

Q. And, without any further conversation with him or suggestion from him, you wrote this letter of March 15, 1947, after conversing with Mr. Sibert?

A. Yes.

Q. After conversing with Mr. Sibert?

A. That is right.

Q. Did you send him this letter special delivery?

A. I may have. I don't remember. We often do that.

Q. Was it because he told you if you were going on with that old arrangement he was through?

A. No, not at all.

Q. Where did you address it to him, his home or the office?

A. I wouldn't remember exactly. We addressed mail both places.

Q. Is it not a fact that you sent that letter special delivery to his home?

A. No, it is not not to my knowledge.

Q. Would you say you did not?

A. I don't know whether I did or not. I don't remember.

Q. You say in here, "Now, you have paid \$994.25 as franchise for January and February

(Testimony of Harold W. Hilts.)

which is \$482.03 over your January and February franchise."

In other words, you had made out a statement and forwarded it to him with this letter showing January and February on the modified arrangement, hadn't you?

A. No, sir, not on the modified arrangement.

Q. In this March 15th letter?

A. That is a correct statement that I sent the January and February statement. January and February was not on the modified arrangement. Those figures were merely used—the statement I sent him at that time was as of December 31st.

Q. You say, "For January and February there is a net profit of \$1,016.55 with the franchise out of it, now you have drawn \$512.22 [178] for both months; if we take \$512.22 like you did that will be your franchise for January and February."

That was on a different basis than the one you had, which you showed him on March 13th, wasn't it?

A. Yes. It was only set forth in that letter, however. There was no different accounting as of January and February, 1947, other than the 20-80 percentage basis.

Q. Then, you say: "Ted tried to explain this to me just before I came up this last time, but I didn't get it." Who do you mean by "Ted"?

A. Mr. Sibert is referred to as "Ted." He tried to explain to me the understanding that he had had with Mr. Brewer back in September, which ran up to December 31st of 1946, and I didn't understand

(Testimony of Harold W. Hilts.)

it, namely, operating dollar for dollar, on the dollar-for-dollar agreement.

Q. Are you through?

A. No. I said, namely, the dollar-for-dollar agreement.

Q. Then, this paragraph in here where you say, "For January and February there is a net profit of \$1,016.55 with the franchise out of it, now you have drawn \$512.22 for both months; if we take \$512.22 like you did that will be your franchise for January and February", that was done out of the goodness of your heart, by you and Mr. Sibert?

A. That is exactly right. Could I have a copy of the exhibit so I could follow it? [179]

Q. You have the exhibit there.

A. All right.

Q. I am not through referring to it, but if you want to read it and make any explanation, go ahead.

A. No.

Q. By the way, you spoke of a man named Taylor who was working here when Brewer got here or came up here. What was Taylor's arrangement with the company?

A. Spoke of a man by the name of Taylor?

Q. Yes, who preceded Mr. Brewer. I will put it this way: Who was working in this territory prior to the time Mr. Brewer came? A. Mr. Taylor.

Q. What was Mr. Taylor getting?

A. What? I don't understand.

Q. What was his remuneration? What was he getting?

(Testimony of Harold W. Hilts.)

He was working on a franchise—he was working on a branch manager's agreement, the same agreement Mr. Brewer signed and was working on until July 1, 1946.

Q. In other words, he was getting \$250 a month?

A. No, he was getting \$200 a month and he was getting 20 per cent of the gross profits in the territory.

Q. Is that the arrangement you gave Mr. Brewer when he first came up here?

A. Exactly the same.

Q. \$200 a month plus 20 per cent of the gross profits? [180]

A. Yes, sir.

Q. That is the arrangement that was made with Mr. Brewer when he first came here?

A. Yes, sir. Any men that are drawing over \$200 per month would have been charged to him as commission at the end or beginning of each month, and if the territory did not make a profit so that he would receive anything like that, he still retained the amounts for the men that would be involved, and that was his salary. To show you the way we operate and the amount of fairness of it, we try to help these fellows; in other words, we don't say, "If you check out and don't get——" We don't make a demand on him for it, never have.

Q. I understand, then, on March 15th you suggested this other arrangement in this letter to Mr. Brewer because you thought it was more advantageous to him?

A. Yes, sir.

(Testimony of Harold W. Hilts.)

Q. What happened in June, June 17th to 20th, that caused the arrangement to be changed as of July 1st?

A. We carried everything clear up to the end of the year, which made it then January and February, 1947, and up to the end, or December 31st, 1946.

Q. Why did you give him a different arrangement beginning July 1, 1947? Why did you go back to arrangement as of July 1st?

A. Mr. Brewer's idea. He wanted it.

Q. Although the other arrangement, you thought, was better, he [181] wanted to go back to the franchise arrangement?

A. Yes. He was better off ultimately. I might point out here on the basis of the dollar-for-dollar agreement, as we had understood that, to show you how much more or, rather, how much Mr. Sibert had believed in Mr. Brewer, Mr. Brewer could have accumulated a bank account, assets and everything else and only drawn a very meager amount for the period of time in which the same amount would be sent to us and then, if he wanted to—we were tied where we couldn't in any way come out on top; if he wanted to, he would have the whole thing and pull out.

Q. Under this 20-80 per cent arrangement you were to get 20 per cent of the gross business done, whether collections have been made or not?

A. That is correct.

Q. Any collections that were not made or losses sustained, why, of course, as to those Mr. Brewer would have to stand them?

(Testimony of Harold W. Hilts.)

A. No, sir, absolutely not. If he does not make a collection or a customer cancels out, leaving a balance owing, owing a balance, we don't take 20 per cent of that figure; we give it to him as a credit.

Q. This accounting you made for July, 1947, the figures you arrived at there are based on the accounts receivable? A. That is right.

Q. In other words, you figured the gross amount of business done; you took 20 per cent of that and arrived at the amount [182] which you claim to be due.

A. On the basis of the gross business. Let's say that 20 per cent is——

Q. Isn't it a fact that in the early part of July, when Mr. Brewer was informed you people were insisting that he should operate from July 1, 1947, on the old franchise basis, that he told you he was through? A. Absolutely not.

Mr. Bernard: That is all.

Redirect Examination

By Mr. Rankin:

Q. Mr. Hilts—— A. Yes.

Q. ——the defendant has challenged this franchise contract on the basis that its operation is unfair. You have, on cross-examination, indicated to the Court that it was better to go back on the franchise than it was for him to proceed on the dollar-take-home dollar-pay-company basis?

A. Yes.

(Testimony of Harold W. Hilts.)

Q. I wish you would explain just the benefit that accrued to Mr. Brewer or would have accrued to him had he seen fit to go on with the agreement that he had made.

The Court: I have got to get to the main issue in this case. I will hear Mr. Brewer tomorrow morning, so I will ask you to lay that aside. As I see it, this revolves around the [183] question of credibility, whether this contract was canceled or not. You have one more witness, your man Fisher, who will testify along the same line?

Mr. Rankin: Your Honor, if I have to select as between the witnesses, I would rather select another one. I would like to use Mr. Fisher, too, but I won't insist.

The Court: Have you another witness?

Mr. Rankin: Yes, your Honor, I have several witnesses.

The Court: On this key question of credibility, whether on June 17th, or whatever it is, this man said that he was all through.

Mr. Rankin: No. There were three people present Brewer, Hilts and Sibert.

The Court: Tomorrow morning, Mr. Bernard, be prepared to put your client on and cover what has been covered here today.

Mr. Bernard: Very well, your Honor.

(Thereupon, at 5:15 o'clock p.m., an adjournment was taken until Wednesday, January 21, 1948.) [184]

Court reconvened at 10:00 o'clock A.M.

Wednesday, January 21, 1948

CHARLES P. BREWER

one of the defendants herein, produced as a witness in his own behalf, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Bernard:

Q. Where do you reside, Mr. Brewer?

A. At 4929 N. E. 28th Avenue, Portland, Oregon.

Q. When did you move to Oregon?

A. I moved in April, 1946.

Q. Did you purchase this property with the idea of being a permanent resident here?

A. I did.

Q. Where did you live prior to coming to Oregon?

A. In Oakland, California.

Q. How long did you live there?

A. Three or more years.

Q. Mr. Brewer, in a general way, what was your occupation and business experience before you became connected with the Paramount Pest Control Service?

A. I was a mechanic, automobile and heavy-duty mechanic.

Q. Will you relate to the Court how you happened to become associated with the Paramount Pest Control Service? [185]

A. Well, my wife, Mrs. Brewer, and the lady that is now Mrs. Sibert were friends. She used to

(Testimony of Charles P. Brewer.)

live next door to us. She had begun to work for the Paramount Pest Control Service and through her I was introduced to Mr. Sibert and that is the way I first got acquainted with Mr. Sibert.

Q. Did you make application to the Paramount Pest Control Service for employment?

A. Not at the time. I never made application until after Mr. Sibert had asked me for two or three months to go to work for him.

Q. About when was that?

A. Oh, I would say that was some time—I went to work for him some time around February.

Q. 1946? A. Right.

Q. Did you own your home in Oakland?

A. We did.

Q. Will you tell the Court what you did for the Paramount Pest Control Service between the time you went to work for them and the time you came to Portland, going into whether or not any instructions were given you and things of that kind?

A. I went out from the office with Carl Duncan, who was then their instructor, and I went around to different accounts, saw how he mixed his bait and put it out for rats, also mice and cockroaches. I was on one job with him where he sprayed two [186] beds for bedbugs.

After about a week of that, close to a week, then I went out selling, by myself, to try and learn what there was about selling, and then I worked at that about a week, and then I went out alternately with one man or another on trouble checks, where they

(Testimony of Charles P. Brewer.)

were having trouble. I went along with them to see if I could help out or learn anything.

Q. You said Duncan would go out and mix bait for rats. How would that be done?

A. Well, as a general rule, the way of killing rats at that particular time was to cut apples and carrots, or vegetables with meat in it, small pieces, into small pieces, sprinkle on a little poison and go and put that out in the corners, behind boards or in places where rats would run.

Q. Was any other information given you as to how to mix any of these baits?

A. No, there wasn't. I asked Mr. Sibert for information so I could study up and find out what chemical I was handling or what I was doing and Mr. Sibert said I wasn't going to take an examination in the State of California and I didn't need to know all that technical knowledge.

Q. There have been introduced in evidence here certain exhibits which I believe you have examined outside the courtroom here. A. I have.

Q. Was any information ever given to you as to any of the [187] formulas that go to make up any of the products represented by any of these labels?

A. No technical information was ever given me. They did tell me that on their mouse grain we had to take birdseed and sprinkle some poison on it and stir it up.

Q. No. 5-10, ant syrup; was any information ever given you as to that?

No. 11892

United States
Circuit Court of Appeals
For the Ninth Circuit.

PARAMOUNT PEST CONTROL SERVICE, a
corporation,

Appellant,

vs.

CHARLES P. BREWER, individually and doing
business as Brewer's Pest Control, ROSALIE
BREWER, his wife, RAYMOND RIGHT-
MIRE, CARL DUNCAN and EARL MER-
RIOTT,

Appellees.

Transcript of Record

IN TWO VOLUMES

VOLUME II

Pages 267 to 537

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for the District of Oregon

(Testimony of Charles P. Brewer.)

A. The information—the only information I had on ant syrup was that Paramount was buying their ant syrup, and that is the only ant syrup I ever saw with Paramount at the time.

Q. So that there will be no question about this, will you run through these exhibits hastily, not taking too much time, Exhibits No. 5-1 to No. 5-24, and tell any information that was ever given to you by anybody connected with the Paramount Pest Control Service as to any of these concoctions? Make it as rapid as possible.

A. The sprays that I see here is Fly Spray F2, Bed Bug Spray—I was told to buy those from the Shell Oil Company and use them. Fungus, I never saw—never saw any of their products.

Q. Refer to the exhibit number, please.

A. No. 5-6, Insect Powder, that was mixed by them, and I never had the formula for mixing it.

Moth Crystals, to my knowledge, was bought on the open market. I never bought any Moth Spray F2.

Phosphorous Paste, they bought in five-gallon lots from jobbers. [188]

Rat Kilzum; Mouse Grain—Most of them are zinc phosphide poisons only that were mixed up as we went along or mixed them up on the job under a warehouse, for instance.

This Roach Powder with—I can't even pronounce it, Exhibit 5-17. I don't know anything about that.

(Testimony of Charles P. Brewer.)

Sodium fluoride is bought upon the open market. Exhibit 5-19.

The Sodium Fluoroacetate labels are bought, the Paramount labels that I have seen on their cans of 1080, which is the common term for Sodium Fluoroacetate, which is bought from the Monsanto Chemical Company in St. Louis, Missouri.

Termite and Fungus Mixture—That is 5-21. Sodium Fluoroacetate (5-22), and Exhibit 5-21 is an envelope I never saw.

Q. Outside of the information that you acquired from watching Mr. Duncan put out this bait for rodents, was any information ever given to you about any of the formulas and processes of Paramount Pest Control Service?

A. Not to my knowledge was any technical information given.

Q. Was there any other information, technical or otherwise, about their formulas?

A. No, not formulas.

Q. Jumping for a moment to the time that you went into business for yourself in August, 1946, have you in the conduct of your business—I mean August, 1947—used any of these products [189] or formulas of the Paramount Pest Control Service?

A. No, I have not.

Q. Where have you bought the things that you have used to carry on your business?

A. I bought them from different drugstores, from different drug concerns, such as McKesson-

(Testimony of Charles P. Brewer.)

Robbins; some articles like mouse traps, and all, I bought from Chown Hardware, and spots of that kind.

Q. Did you retain, when you went into business in 1946, any of the formulas or products of Paramount Pest Control Service?

A. You mean August 1st, 1947?

Q. Yes. A. I did not.

Q. Coming back now, under what arrangement did you come to Portland?

A. Under the arrangement of \$250 a month salary.

Q. There has been testimony in the case that, at some time, in California, you were shown a copy of one of these franchises. What is the fact as to that?

A. I didn't see a copy of the franchise. I knew that there was a franchise that they did give to different men in the territories where the amount of business would support a franchise.

Q. Did you have any discussion with anybody down there about a franchise? [190]

A. Yes, I talked with Mr. Sibert about one. It was a lengthy conversation and he told me that the Portland territory was in the red and that he would send me up here as manager and, when this business got up to \$4,000 to \$5,000 a month, it would be enough to support itself, and then I would have a franchise.

Q. In the meantime you received what?

A. \$250 a month salary.

(Testimony of Charles P. Brewer.)

Q. What date did you come to Portland?

A. I think I entered the State of Oregon on about the 8th day of April.

Q. Who came with you?

A. Harold Hilts.

Q. What was done when you came to Portland?

A. Well, we got a room, I believe, at the Roosevelt Hotel or the Congress Hotel—I stayed in several the next few months; I don't remember which was which. Harold Hilts attended to the business end of it, as far as I know. In fact——

Q. What do you mean, the business end of it?

A. He went out and talked to the former manager and got the books of the company to pull and audit or something. I stayed around the hotel. Mr. Glenn Fisher arrived up here around the 9th or 10th of April, and they called Mr. Taylor, the former manager, in for a conference and fired him. Mr. Fisher did this. Then Mr. Harold Hilts showed me the books.

Mr. Fisher went back to California immediately after [191] that; in fact, that day; and Harold Hilts showed me how the books were handled, what they looked like, what different books there were, that evening until eleven o'clock, and the next morning he showed me again, to the best of his ability, and the best I could learn, what was going on. Then he took the plane back that day for San Francisco.

Q. Did that leave anybody here for the Paramount Pest Control Service except yourself?

(Testimony of Charles P. Brewer.)

A. There was one man, Ray Warmuth, that was working for them at the time. It seems he was working part time. I don't know just what the arrangement was. I saw him three or four times during the month of April. That is all I saw him.

Q. Did they have an office?

A. Not an office; they had a call office where phone calls could come in, and Hilts had brought down the books and typewriter and office paraphernalia, all of that, this, that and the other, to the hotel room and left it there with me.

Q. You started in to operate from the hotel?

A. I was in the hotel until I could find an office.

Q. When did you find an office?

A. About May 1st.

Q. Did you sign up a lease?

A. No, there was no lease on the office. I was offered a lease, but I never signed one.

Q. You did sign a lease on the warehouse? [192]

A. I did.

Q. Yesterday counsel asked Mr. Sibert whether or not you had violated any provisions of the franchise and he said you had taken this lease in your name. Will you explain that to the Court?

A. The lease was made out to Charles P. Brewer, doing business as Paramount Pest Control Service.

Q. Why did you make it out that way?

A. That was the understanding as to who owned the business and how it was named, and my insurance has been ordered in that name, and that was

(Testimony of Charles P. Brewer.)

the name. Our insurance was in the name of Charles P. Brewer, doing business as Paramount Pest Control Service.

Q. Who had ordered that insurance?

A. That had been ordered from the Oakland office, through their agent in Oakland.

Q. That was prior to the time this corporation had been organized, was it?

A. No, they had been organized at the time, because my insurance was dated September 1, 1946.

Q. Where were the poisons and things kept when you first started in?

A. What I did not have in the hotel, which was not much, was out to Taylor's home when I arrived here. They wanted it out of there immediately. We had to move it to Ray Warmuth's garage. It was right on the sidewalk, and had no doors to it, and the [193] kids were playing in it and causing trouble, and I tried to find a warehouse for it and I finally got it into Crosby's Garage until I could find room in a building where I could locate it, other than in somebody's personal garage.

Q. You have testified you were to be paid \$250 a month until business got to, you say, about \$4,000 or \$5,000 a month? A. I was.

Q. At any time, up to the time you severed your connection, did the business reach that volume? A. It never did.

Q. What was the volume of business in the year from July 1, 1946, to June 30, 1947, in round figures?

(Testimony of Charles P. Brewer.)

A. Well, I don't know the division of the entire one year, but the thirteen months, the entire time of the franchise, it hit around \$35,000, in round figures.

Q. Did you put any money in the business when you first started in here?

A. Yes, I opened the bank account at the First National Bank with \$1,000 of my own personal money to carry the payroll and expenses until it would get some money into the organization.

Q. When did Mr. Duncan come up?

A. The first time he came up was May, around May, somewhere around May 10th.

Q. What did he do while he was here?

A. He trained three days—He was here around eight to ten [194] days in Oregon, but he trained Rightmire three days and then he left here on the Eastern Oregon service run and serviced through up the Columbia River to the Idaho line and back through Burns and Bend, Oregon, and back into Portland.

Q. Then, when did he come later?

A. I believe it was in October or November, the next time he came up.

Q. What did he do from that time on?

A. He was here with me, training men in the southern part of the state that I couldn't go down there and train. He was down there for two weeks or three weeks. I don't know just the exact time. He went from there up to Washington and he worked up around Spokane, Washington, for the

(Testimony of Charles P. Brewer.)

Paramount Pest Control Service for a period of, I don't know, two weeks to a month or six weeks. I don't know.

Q. By the way, there were some magazines marked as exhibits in this case, purporting to be devoted to insect control and so forth. Those are not put out by the Paramount Pest Control Service, are they? A. No, they are not.

Q. Are they ever sold to the public?

A. They are sold to the public.

Q. In dealing with these other people from whom you buy in your business, can you get data from them as to insect control and rat control?

A. Oh, yes. The Zehrunge Chemical Company will give you any information you want on the control of any of them insects.

Q. Can you tell the Court, in round figures, about how many new accounts you procured in the thirteen months you were with Paramount Pest Control Service?

A. I would say between four and five hundred accounts.

Q. About how many accounts did they have when you came here?

A. I would say, not calling Safeway Stores as all individual ones, I would say somewheres around 100 to 150.

Q. Was there, at any time, any complaint made to you by anybody connected with Paramount Pest Control Service as to your conduct of their business in the State of Oregon?

(Testimony of Charles P. Brewer.)

A. No. They always thought that I was doing a wonderful job up here, and bragged on this as being one of the best territories in the organization.

Q. How did it happen, Mr. Brewer, that you transferred from this \$250 a month to the signing of this franchise?

A. Mr. Sibert came up here the latter part of June, I would say after the 25th, some time, and he said—he stayed out at our home; that was a common occurrence between us—and he told me at my home that he was going to let me have a franchise. I said I did not want any part of a franchise; the business is in the red; and I could not support a franchise, and he said, “I have got to dump it.” He said, “I have got to dump the business. We are incorporating in the State of California the first day of [196] July, and the State of Oregon is operating in the red, and we cannot incorporate if we take a portion of our territory operating in the red. He told me that I would have to take a franchise out, or I was out at that time.

Q. At that time had you bought your home in Oregon? A. I had bought it in Oregon.

Q. And you had sold your home in Oakland?

A. I had sold my home in Oakland and moved up here, all of our furniture up here and——

Q. In operating under this franchise, did you have anything to do with fixing the prices of the merchandise that you had to buy from the company?

A. None whatever. If we ordered anything from Paramount, they sent us a bill for it.

(Testimony of Charles P. Brewer.)

Q. Did you need an automobile in the transaction of business? A. I did.

Q. Did you request them to furnish you one?

A. I asked Mr. Sibert about an automobile, if they could help me out in getting one, and he said it was my business; if I wanted an automobile I would have to go and buy it, so I did.

Q. Did you have an automobile of your own?

A. I had one of my own, personally.

Q. Was that used in the business?

A. It was used by me in the business.

Q. Was anything furnished, in the operation of this business, [197] by the Paramount Pest Control Service?

A. Well, if I needed some sodium fluoride, I would order from them, but if I wanted some 1080 I would write them and tell them to send me some, which they did, and to bill me for it. They sent me any office stationery or anything I needed, with a statement for it, of course, from themselves or from the printing company.

Q. You say that the gross income for the thirteen months was \$35,000. Can you tell the Court, in round figures, the expenses of operation, exclusive of any moneys sent to the Paramount Pest Control Service on the franchise?

A. It was somewhere around \$29,000 to \$30,000, was the expenses.

Q. That would leave a net profit of \$5,000?

A. Approximately, yes.

(Testimony of Charles P. Brewer.)

Q. If you had to pay Paramount Pest Control Service 20 per cent of \$35,000, you would be \$2,000 short? A. I would have been.

Q. When did you first discuss with anybody connected with Paramount Pest Control Service any change in the terms of this franchise?

A. Right during the time, after Thanksgiving in November, I talked with Mr. Sibert in the Oakland office. I told him that the business could not be operated on a 20 per cent gross to them; that it would cost me more and everything else, and I would not operate that way. [198]

He told me that he would try to get it back to where it would be 50-50 for us, and I said that would be all right, and he called Harold Hilts into his office, or Mr. Hilts walked into the office, one or the other, right at that particular time, and Mr. Sibert told Hilts that he could make that change, whereas it would be a 50-50 proposition, even on the net profits—I don't remember that word "net profits" used—but it was a 50-50 proposition, and that they would change it over to that.

Q. Was anything said or discussed as to how long that would run or whether it would terminate at any period?

A. Mr. Sibert asked me if I wanted it to run until the first of the year, for one year, or when, and I said, "As far as I am concerned, it can run from now on, as long as the contract is in force," and he said, "All right. If that is the way you

(Testimony of Charles P. Brewer.)

want it," and I said, "That is the way I want it," and he said, "That is the way it will be."

Q. He said he had some talk with you up here in September about this thing and had forgotten to report it to those men until December. Did you ever discuss it with Mr. Hilts at all?

A. Not to my knowledge was anything discussed in September.

Q. When, with reference to that time, was there any question or discussion with anybody as to this change in the terms of the franchise?

A. The only time anything was said about it whatsoever was when Mr. Hilts pulled up an audit statement from the books—pulled [199] an audit statement from the books—around September 13th or 14th and presented it to me.

Q. Everything, as far as you knew, went along satisfactorily until some time in March?

A. It was.

Q. When did Mr. Hilts see you in March?

A. I don't remember whether it was the 13th or 14th. It was probably the 13th or 14th.

Q. Where was it?

A. At the office in Portland here.

Q. Tell the Court what happened here at that time, at that meeting with Mr. Hilts?

A. Mr. Hilts pulled up a balance sheet or rough draft of the books and told me that I owed the Paramount Pest Control Service \$994 for January and February's operation, and it seemed to me—it made me so mad I couldn't talk.

(Testimony of Charles P. Brewer.)

I turned to my wife and I said, "Make them out a check." She looked at me as though I was silly and I said, "Make out the check," and she made it out quick and I handed it to him.

A few minutes later I got my things and I said, "I will drive you to the airport," and on the way to the airport I told Hilts that I was completely done with Paramount Pest Control Service.

Q. Was that this check for \$994.25?

A. It is.

Q. Now, this audit that he showed you as a basis for the money [200] they were claiming you owed, was that audit made on the 50-50 basis, or was it made on the 20-80 basis?

A. It was made on the 20 per cent of gross business done.

Q. Can you turn to Exhibit 29 in that bunch of exhibits? That is the letter of March 15th from Harold Hilts.

A. I have it.

Q. Do you have it front of you?

A. Yes. This is the one he sent me.

Q. Can you tell when Harold Hilts left Portland?

A. He left here on Friday evening, around four or five o'clock in the afternoon, rather.

Q. That would be on March 13th?

A. I believe the 13th or 14th. I have no idea for sure.

Q. I think the calendar will show March 13th. It was at that time you told him that you were through?

A. It was.

(Testimony of Charles P. Brewer.)

Q. I think the 14th was Friday. I think the calendar shows 15th was Saturday. When did you receive this letter, this letter which is marked Exhibit 29?

A. I received it at nine o'clock in the morning at my home, airmail special delivery.

Q. Sunday morning?

A. Sunday morning.

Q. The third paragraph reads:—The first paragraph, I should say: "Enclosed is a statement of your account for 1946, also [201] January and February of this year.

"You will note that this splits everything across the board for 1946 and we both come out with \$1,479.65 and you still have your \$1,000 investment in the business.

"For January and February there is a net profit of \$1,016.55 with the franchise out of it, now you have drawn \$512.22 for both months; if we take \$512.22 like you did that will be your franchise for January and February."

Did that differ from the audit that he had sprung on you on the 12th or 13th?

A. It absolutely does.

Q. Why did you go on then with the business, after you had told him you were all through?

A. Because he wrote me this letter and explained in here that they would split across the board, and that Sibert had tried to explain it to him just before he came up here but he didn't understand. That is what it says here.

(Testimony of Charles P. Brewer.)

Q. All right. When was the next discussion you had with anybody about the way the money was to be divided between you?

A. I think maybe in April. Hilts and I may have mentioned it some, of course, around the office there, but there was no great discussion on it at that time.

Q. When was there any discussion to the point that there was any difference between you?

A. The first difference as to moneys or anything was down in [202] Oakland, right at the last, the controversy of June.

Q. Did you see Mr. Hilts? He said he saw you between the 17th and 20th of June.

A. Why, I saw him the 17th of June. He and Mr. Sibert came here but he did not pull an audit of the books at that time. He had a recap of the business done, the income and expenses. He made out a blank statement to turn in to the bank and then he and Mr. Sibert went on to Seattle. I gave Harold Hilts a key to the office and files so that he could come into the office and pull an audit of the books while I was in California.

Q. In other words, an audit was not made——

A. An audit was not made until after I had left Portland.

Q. You said a bank statement, a financial statement, was prepared for the Bank of California. Who prepared that?

A. Mr. Hilts prepared it.

(Testimony of Charles P. Brewer.)

Q. I am referring now to Exhibit 77. I will ask you who did the typewriting?

A. Mr. Hilts did that.

Q. What—For what purpose was that exhibit prepared?

A. To present to the bank to establish credit for me so I could borrow money from the Bank of California.

Q. For what purpose?

A. To give to him.

Q. When had anybody requested that you borrow money to pay on your indebtedness to them?

A. Mr. Sibert had called me some time the latter part of April or the first of May from Seattle and told me that he was in a pinch for money and would I please go and borrow some money and give to him. He wrote me a letter from Oakland shortly thereafter, which is in the files at the office, asking me to go down——

Mr. Rankin: Just a moment. The letter is the best evidence, of course.

A. All right.

Q. (By Mr. Bernard): Never mind. Just a moment, please. This Exhibit 77 was prepared by Mr. Hilts? A. It was.

Q. For the purpose you have indicated?

A. Yes.

Mr. Bernard: I offer this in evidence as Defendant's Exhibit No. 77. The defendants' exhibits have not been offered yet.

The Court: Is that a new document?

(Testimony of Charles P. Brewer.)

Mr. Bernard: No; it is a pre-trial exhibit.

Mr. Rankin: It was reserved—a number was reserved at the pre-trial for it, but we have not seen the exhibits before this morning. I won't take the time now, but I want to reserve our objections until later. You want to use it?

Mr. Bernard: I want to use it, yes.

The Court: Admitted.

(Financial statement of Charles P. Brewer to [204] the Bank of California thereupon received in evidence and marked Defendants' Exhibit No. 77.)

Q. (By Mr. Bernard): I notice this is made out in the name of Charles P. Brewer and it says, "Cash in Bank of California, \$75.10." Was that the bank account that you handled the business through?

A. That was the bank account, the bank balance at the end of May.

Q. "Accounts Receivable, \$3,624.56." Were those amounts owing you in your operation for the Paramount Pest Control Service?

A. That was due and payable on the books.

Q. "Real estate and buildings, \$5,250." What real estate and buildings were represented?

A. It would be my home.

Q. "Autos and trucks, \$1,836." Does that include your automobile?

A. My personal automobile and Plymouth coupe that I bought.

(Testimony of Charles P. Brewer.)

Q. When did you buy your personal automobile?

A. In October, 1942.

Q. "Other assets, personal furniture, \$2,100."

Is that the furniture at your home?

A. That is.

Q. "Accounts Payable, \$2,759.63." Is that the money that you owed Paramount Pest Control Service?

A. That is. [205]

Q. Was that money that they wanted you to borrow to pay? Was that the account, \$2,729.63, that they wanted you to pay?

A. It is.

Q. Did you borrow money from the Bank of California?

A. No, I didn't.

Q. Why not?

A. Because I would not go into debt for the Paramount Pest Control Service from California. Ted told me he would never press me for money unless this office could pay off; until it could pay off he would not press me for money, and I was not going to go into debt like Osborn and a lot of other managers up here had, and go broke because of it.

Q. When they informed you—When were you informed, rather, that you were going to be required to go back on the 20-80 basis as of July 1st?

A. Mr. Sibert told me that just prior to July 1st.

Q. Where?

A. I don't remember the exact spot, whether it was at his home or in his office in Oakland, California.

Q. What were you told about that?

A. I was told that I was going back on the 20 per cent basis; that he had worked out on a piece of

(Testimony of Charles P. Brewer.)

paper a budget whereby I could operate and make more than \$850 a month and the firm \$600, and that would be a profit on a \$2500-a-month business. I couldn't see where I could make that much by traveling clear to [206] Boise, Idaho, and below Klamath Falls, Oregon.

Q. What did you tell him?

A. I told him it would not work and that I would carry the business for the month of July.

Q. Did you tell him what you would do at the end of the month of July?

A. I didn't tell him right then what I would do. I told him I would carry the business for the month of July.

Q. Did you agree at any time to go back on the 20-80 basis?

A. I never agreed with them. They put me right back on the 20-80 basis.

Q. After you wrote this letter of resignation, did Hilts come up here?

A. Yes, he came up here around the first day of August.

Q. Will you tell what you did with Hilts as to turning over to him any of the property of the company that you had been using in the operation of this business?

A. Mr. Hilts and I went down to the office and got paper and we started in to take an inventory of the supplies around the office. We were both writing down, so we decided to make that simpler, and

(Testimony of Charles P. Brewer.)

he wrote it down and I would call it off, and we would check it.

I called off all the supplies and equipment around the office. Then we went out to the warehouse, went in there, at Fifteenth and Marshall, and took an inventory of all supplies [207] and equipment there.

I told Hilts that there was a spray trailer and spray machine at my home, and we would go out there and get those, and we went out there and he saw the spray trailer. I told him what it cost and where it was. The spraying machine I couldn't find. It was not there, and there was a few little items—a little bit of bait or maybe a little sugar or something like that, that had been laying around. We gathered that up and I gave it to Hilts, and that was noted in the inventory.

I told Hilts I would either get them a spray machine or I would find it, and the spray trailer they could have had.

Then, the next day, or that evening, Hilts had gone into the warehouse and taken a spray machine or something out of the warehouse, and I don't know whether he had done a job with it or not, but when I found out about it through the management of the building I told him they were not allowed in that office any more until I had a definite statement because every time I asked, "What kind of a settlement are you going to make with me?" he said, "You know we will do just what is right by you." I said, "What kind of a settlement?" And he said,

(Testimony of Charles P. Brewer.)

"We will settle like we said we would," and that is all he would say. I locked up the warehouse until they would make some kind of a definite statement as to the settlement.

Q. These supplies, equipment and things you turned back, had you already been charged for them by the company? [208] A. I had.

Q. All right. Going to this settlement that you wanted to have——

A. That was on a Saturday, I believe. I believe it was Saturday afternoon. I am not sure of the exact time, but Mr. Fisher, Wendy Fisher, and Harold Hilts were there at the time. I told Mr. Celsi that they were not allowed in the building until I said so. Mr. Celsi told them that he had leased the building to me and when I said they could go in, they could. I believe it was Saturday afternoon. They were locked out of there until Monday.

Monday Mr. Sibert came up and he argued back and forth about forty-five minutes before he definitely said he would settle with me, pay me any moneys due and payable to me, and pay me for my supplies and equipment.

Q. Did you turn everything over to him?

A. Turned everything over except the spray trailer. It was hauled out and parked on the street. I left it there for them to come and get it any time they had a place to park it. The one spray machine—I told them I would bring it down to him. I didn't have it—it was out; one of the boys had it; and I got it later, and I didn't take it down to them.

(Testimony of Charles P. Brewer.)

Q. Did you make a demand that they have an audit at that time?

A. I told Mr. Sibert that if these books were audited by a Portland accounting firm and we settled on that basis, then he [209] could have the warehouse and the supplies and the rest of it, but that they could not take these books to California for an audit down there.

The next morning Mr. Sibert called in Mr. Young, I believe, of Jones and Young, an accounting firm, to audit the books and before he could get started Mr. Sibert said something to him and he got mad. He called up Sawtelle, Goldrainer & Company, and they went down and completed an audit of the books.

Q. That has been known in these proceedings as the Sawtelle Goldrainer & Company audit?

A. Yes, sir.

Q. Exclusive of this \$1,000 that you put into the business, what were your drawings from this company for the thirteen months that you were with them?

A. Other than getting back the thousand dollars that I put in to carry it forward and the expenses that was paid, I drew thirty-two hundred and a few dollars.

Q. Some testimony was given in this case that they paid for you to take an airplane trip to California. Do you recall that?

A. They did not pay for that airplane trip. It was around the 25th day of June. Mr. Sibert—

(Testimony of Charles P. Brewer.)

Mr. Hilts and I had called him. He did make a reservation so I could go on the same plane Mr. Sibert went on, but Checks numbered 398, 399 and 400 show where I drew altogether \$200 just a day or so before I left. I used that to buy my tickets and met Mr. Sibert at the airport [210] with my daughter and we got on the plane and flew to California and I bought those tickets.

Q. Mr. Brewer, about when did you decide to go into business for yourself?

A. It was after the 15th of August and somewhere around, I would say, around the 20th or 25th, of July, pardon me.

Q. There is an exhibit here showing that your wife first filed an assumed name certificate and later you did. Why was it that your wife signed the first one?

A. I was still working with Paramount and I was out helping to service calls and continuing to work for them, and I did not feel like taking the time to go and do it.

Q. Did you attempt to devote your best efforts to the Paramount Pest Control business up to the first of August?

A. I devoted every minute to Paramount up to August 1st.

Q. Mr. Hilts testified that he saw you at the Roosevelt Hotel July 31st. Do you recall that?

A. I do not recall for sure whether he did or not.

(Testimony of Charles P. Brewer.)

Q. Well, he said in substance that he asked you what had happened and you said you could not make a go of it, and that Rightmire was quitting, wasn't going to stay in the extermination business, that you promised to give him Rightmire's address and never did. Does that call the matter to your attention? A. There was a meeting of that kind.

Q. Tell what your recollection is of what went on? [211]

A. I don't remember how I happened to go to the hotel. I do remember now that he did ask me for Rightmire's address. I told him I would get it from the office. I didn't find it at the office and I didn't call him back. He called me up at my home and asked me what the address was. I didn't know the name of the street. I knew where it was but I didn't know the name of it, nor the address; and the next day, after the inventory was taken, and we were out to my home, he asked me where Ray lived. I told him I didn't know his address but I knew where it was, and he said, "Will you draw me a map so I can find it?" And I said, "Yes," and I took a piece of paper and drew out a map to show him where the Safeway Store was on the corner and showed him the house on the map, where it was, Ray Rightmire's home.

Q. There is some evidence that shortly before the 1st day of August there were three cans of this 1080 returned from Seattle.

A. There were two cans returned to me from Seattle, because Mr. Osborn had requested two cans

(Testimony of Charles P. Brewer.)

about a month before that, that he was in need of some what is known as 1080 in a hurry and would I ship it to him, and I shipped it to him airmail that day, and in July some time I wrote Mr. Osborn and told him I wanted the two cans or the amount that I had paid for them and he sent them back to me, and when I turned over these supplies to Paramount there were at least three cans of 1080 on the shelf for them. [212]

Q. Then, from August 1st on, you did not use any property of any kind or character belonging to Paramount Pest Control Service in connection with your own business?

A. I never used that spray, that "Hi-Fog" nor the trailer.

Q. Or any other of their products?

A. None of their products whatever.

Q. Did you retain in your possession any lists of their customers? A. I did not.

Q. How did it happen that Rightmire and Duncan came to work for you, and Merriott, too?

A. Well, Mr. Rightmire was hired by me after being interviewed by Mr. Sibert.

Q. I mean, by you after August 1st. How did you happen to hire Duncan, Rightmire and Merriott to work for Brewer's Pest Control?

A. I offered Ray Rightmire a job August 1st or thereabouts, and he came to work for me. I offered Earl Merriott a job around August 1st and he came to work for me, and around the 18th or 20th

(Testimony of Charles P. Brewer.)

or somewhere around there I offered Carl Duncan a job, as he said he had to work for a living, so he went to work for me.

Mr. Bernard: I think you may cross-examine.

Cross-Examination

By Mr. Rankin:

Q. Referring to the poisons that you described, from the exhibits that have been admitted in evidence, you say they are all those poisons, common poisons, you can buy on the open market, anyplace?

A. Most of them are that I know of.

Q. You put quite a limitation on your answer. How many of them do you know of?

A. These that have Paramount labels on them I couldn't buy on the market. You can buy a similar product but not these labels, but at least the ingredients, as I read the ingredients here, on the open market.

Q. When you say "as I read the ingredients," do you refer to the active or inert ingredients?

A. I mean the active.

Q. You know enough about pest control to know that active ingredients are required, at least by the laws of Oregon and California, to be placed upon the can or the container?

A. It is according to whether you are selling or using. We do not sell. We do not have labels for any poisons that we handle because we do not sell poisons.

(Testimony of Charles P. Brewer.)

Q. Would you answer my question, please?

A. What was the question?

(Question read.) [214]

A. To my knowledge, they are not required in the State of Oregon to be placed on the can unless it is for sale.

Q. If you manufacture it, even for use in your own business, labels are required to be placed on the cans?

A. To my knowledge, it does not.

Q. Does it in California?

A. I don't know the California law.

Q. Your statement was you could buy on the open market—I recall this instance—moth crystals. Can you buy the same poison in moth crystals on the open market as it is put out by Paramount Pest Control Service as “Moth Crystals”?

A. I don't know what Paramount puts out. I know I can buy Paradichloro Benzene Crystals on the open market.

Q. Do you know any of the formulas under which Paramount puts out any of these poisons as they appear on the labels? A. I do not.

Q. So you could not honestly state, then, could you, that you can buy this same product on any common market?

A. I can buy the active ingredients on the common market.

Q. You mean by that you can buy ingredients like those that are used and named in the Paramount labels? A. Yes.

(Testimony of Charles P. Brewer.)

Q. Now, when did you get the 1080 from Mr. Osborn in Seattle, Washington?

A. It was some time, I believe, after the 15th day of July, 1947. [215]

Q. You got two cans?

A. I got two cans, yes.

Q. You claim that they were redelivered to Paramount? A. They were.

Q. Who received them?

A. Harold Hilts, in the inventory of the equipment in the warehouse at the time.

Q. Who delivered them to him?

A. I did. They were sitting on the shelf and I called them off to him, and he saw that they were there.

Q. Have you at any time since July, 1947, used 1080? A. I have.

Q. Where did you get the 1080?

A. I got it from the Monsanto Chemical Company.

Q. Direct?

A. I got one can from the Fish and Wild Life, and I ordered my others from Monsanto.

Q. Have you got any communication that will show you ordered it from this company?

A. I don't have with me.

Q. Have you got any communications anywhere?

A. I got a letter from Monsanto, yes. I don't know just what you mean by order. I wrote them and told them I wanted it and they wrote me back

(Testimony of Charles P. Brewer.)

instructions just how to get it, and I have a copy of my insurance made out by the insurance company to [216] Monsanto for it.

Q. Just answer one question at a time. Have you in your files anywhere this order to Monsanto for 1080?

A. No, I wouldn't say that I have. If I wrote them a letter to send me some, I didn't keep that letter in my files.

Q. You don't keep any record of your orders of poisons as deadly as 1080?

A. I don't need to keep a record of the order.

Q. I didn't ask you whether you needed to or not. I asked, did you?

A. I wouldn't say for sure. I don't believe I have.

Q. Have you got any letters or anything of record to show whether or not Monsanto Chemical Company sent you any poison known as 1080?

A. What do you mean, record?

Q. Don't you know what a record is after you have been through the preparation of this case? I mean a paper or any statement, typewritten, or written by hand, that says, from this chemical company, that "We are sending you so much of the poison commonly known as 1080?"

A. I have no such thing that I know of.

Q. Now, you say you got a can from Wild Life?

A. Yes.

(Testimony of Charles P. Brewer.)

Q. How did you get that can?

A. I went up and asked them to give me a can of it. [217]

Q. Where are they located?

A. Their main offices are located in the Weatherly Building.

Q. Here in Portland? A. In Portland.

Q. When? A. The first day of August.

A. I would not remember his name.

Q. Do you mean to tell this Court you can buy a can of 1080 from Wild Life? A. I can.

Q. How much did you pay for it? A. \$8.00.

Q. \$8.00 for a can?

A. No, \$4.00 for one can. I meant one pound when I said one can.

Q. You got one pound, now. Your statement is now that you got one pound of 1080 from Wild Life? A. I did.

Q. What? A. The first day of August.

Q. What year? A. 1947.

Q. And you paid \$4.00 for that can?

A. I paid \$8.00 for that pound.

Q. \$8.00 for that pound? A. Yes. [218]

Q. Did you put up any bond with them in connection with that purchase of it?

A. With Fish and Wild Life?

Q. Yes. A. No.

Q. They just sold it to you direct?

A. They have done that to several exterminators in the State of Oregon, including myself.

(Testimony of Charles P. Brewer.)

Q. Did you make any representation to them about your use of it?

A. I told them I was familiar with the use of it.

Q. And you did that for the purpose of serving customers of yours who had formerly been customers of Paramount Pest Control Service?

A. I did it to get poisons to serve customers of Brewer's Pest Control.

Q. Who had formerly been customers of Paramount?

A. Some who had not been.

Q. But some who had been?

A. Some who had and some who hadn't.

Q. Been customers of Paramount Pest Control Service? A. Right.

Q. You stated that the company was in the red, I mean, that Paramount Pest Control Service was in the red when you came here? [219]

A. That is what I was told.

Q. You do not claim the truth of the matter for yourself, then?

A. If it isn't, they lied to me.

Q. Who was it that lied?

A. Harold Hilts and T. C. Sibert.

Q. Did you make any effort to ascertain if it was true?

A. I did not pull an audit of their books to see if it was true.

Q. Did you make any effort to ascertain the condition of your company? A. Yes.

(Testimony of Charles P. Brewer.)

Q. For the two months after you came?

A. I don't understand that.

(Question read.)

A. Yes, it was in very bad condition.

Q. You mentioned Mr. Taylor. Do you know whether he had a contract or not?

A. I don't know anything about his relationship with Paramount.

Q. You spoke about Mr. Osborn had gone broke on his contract.

A. I don't know.

Q. You said that he had gone broke.

A. I said that they got him in debt.

Q. If I recall correctly, you used the word "broke."

A. Well, I don't know what their relationship was now, but T. C. Sibert asked me, after I made the trip to California in November, [220] to go to Seattle and see about it, that Osborn was taken back off his franchise and put on a \$250 a month drawing account, because he was over in debt, and Mr. Sibert asked me to go up there, which I did.

Q. You went up there? A. I did.

Q. Did you make a success of Mr. Osborn's business?

A. I didn't make any success of anything up there.

Q. Nor here either, did you? A. Yes.

Q. Is Mr. Osborn still with the company?

A. To the best of my knowledge, he is.

(Testimony of Charles P. Brewer.)

Q. You said, I believe, on your direct examination you had made no list of the customers that you had formerly served when acting as agent for the Paramount Pest Control Service?

A. I made no list from there, to take away from there.

Q. As a matter of fact, you took the books home, didn't you? A. I didn't.

Q. You took them home and made a list from them, both as to the account and as to the name of the patron? A. I did not.

Q. Where did you get the list that you compiled in your answer, when you identified 141 former customers of Paramount taken over by yourself?

A. What do you mean by list or listing? I took them from a list [221] that I made up from our books, Brewer's Pest Control.

Q. How did you know, then, that they were former patrons of Paramount Pest Control, unless you had some record? A. By memory.

Q. You remember 141 accounts of Paramount Pest Control Service?

A. What do you mean, remembered 141?

Q. I am just using that word. What did you mean by remembering?

A. You are asking me about the list that I made that you called for in the notice to produce?

Q. Yes.

A. Is that the one you are referring to?

(Testimony of Charles P. Brewer.)

Q. Yes.

A. I took those from Brewer's Pest Control books.

Q. How did you know they were also patrons of Paramount Pest Control Service?

A. Because we had been servicing them, according to my memory, over eighteen months period of time. If a name is called, I can at least remember the name.

Q. Will you now name the 141 former patrons of Paramount Pest Control Service?

A. If you will put the 141 names in front of me where I can see them, I can.

Q. You cannot remember them without you have aid from your own records?

A. I can't remember 141 names here at the present moment, unless [222] you put a list of people in front of me. Then I can call off those that we had serviced as Paramount.

Q. You had your own records when you did call off these names?

A. I didn't have to have my records. If I remember a name, I can——

Q. Then, the reason that you remember, if you do remember, that you had 141 names is because your business is comprised almost entirely of those patrons that you had served under the Paramount Pest Control Service?

A. No. A big per cent of our customers had never heard of Paramount Pest Control Service.

(Testimony of Charles P. Brewer.)

Q. What per cent?

A. I didn't figure the percentage.

Q. Do you mean to tell the Court that you do not know what percentage of your business was from these Paramount Pest Control people, and what percentage was not?

A. I don't know the percentage of what was formerly Paramount and what was not. I was not interested in percentages.

Q. Would you say that a majority of your customers were also customers of Paramount?

A. A majority of them.

Q. What would that amount to, between 80 and 85 per cent?

A. I would say no to that.

Q. Referring to the franchise, it is your position that the franchise went on as it was written until Thanksgiving in the [223] following November?

A. It did.

Q. Nobody made any change in it during that period of time?

A. None whatsoever.

Q. When did you first see the franchise, the form of franchise agreement?

A. Some time after the 25th of June, 1946, when Mr. Sibert took a franchise or a copy of some franchise that they had, to copy off one so that they could have it for me to sign.

Q. Did you read it then?

A. I read it, yes.

Q. You signed it when? How much later?

A. It was signed effective July 1st. I wouldn't know the exact date, somewhere between three and four days before that.

(Testimony of Charles P. Brewer.)

Q. Was it signed by Mr. Fisher at the time that you signed it? A. No, it wasn't.

Q. Did you see anything which was unfair in your contract at the time you read and subsequently signed it?

A. I saw everything unfair about it.

Q. Why did you sign it?

A. I was out of a job if I did not sign it, and I was in a strange town.

Q. Your position is that you claim you were forced to sign that? A. Practically, yes.

Q. Under duress? [224] A. Practically.

Q. Why didn't you plead you were under duress, if you were?

A. I did. He told me I would either sign it or else I was out of a job.

Q. Why didn't you plead it in your complaint here, your answer rather?

A. As far as I know, I did.

Q. Of course, you know you did not.

Mr. Bernard: I don't think counsel should argue with the witness. I object to it.

The Court: Go ahead.

Q. (By Mr. Rankin): When did you first consider that this contract was no longer an agreement that you had to live up to?

A. I first considered it as of no value whatever to me, or them, around July 25th somewhere, somewhere around there.

Q. What year? A. 1947.

(Testimony of Charles P. Brewer.)

Q. On July 25, 1947, that is about the date you sent in your resignation?

A. That is the date I sent in—around that date that I sent in this letter confirming my resignation.

Q. At that time you had come definitely to the conclusion that the contract was not one that was binding on you or Paramount?

A. I considered it not worth the paper it was written on.

Q. Did you so consider it in February or March of 1947? [225]

A. I did, at the time Harold Hilts told me I was going to have to pay 20 per cent.

Q. All right. Which time did you consider the contract of no validity, in February or March of 1947, or in July, 1947?

A. For about two days in March I considered it no good until I got that letter, explaining it, and then I considered it absolutely no good in July.

Q. For two days in March, 1947, you thought the contract was all right?

A. I thought their word was all right.

Q. How about the contract?

A. Their word modified the contract.

Q. Did you make any payments under this contract? A. Which contract?

Q. The one we will call the franchise.

A. I made three or four payments on it.

Q. The first one was when?

A. Around—I don't know the exact date, but somewhere around March 6th, I believe.

(Testimony of Charles P. Brewer.)

Q. Didn't you make your first payment February 6th? A. Maybe that was the date.

Q. That check is in evidence. That shows \$338 and \$250 being allocated to the franchise.

A. It does.

Q. Did Mr. Hilts ask you for that? [226]

A. He did not.

Q. You paid it voluntarily? A. I did.

Q. And when you paid the \$250 and put on it "for franchise," you referred to what?

A. To the franchise.

Q. To the franchise?

A. To the franchise payment I would have to make to Paramount.

Q. That is, on the 20-per cent basis?

A. It was on the franchise, on the franchise payment, on a 50-50 basis.

Q. A 50-50 basis?

A. It had already been modified in November.

Q. It is your position that that modification continued to operate after December 31st?

A. It was my notion that it did.

Q. Did you make another payment labeling it "franchise"? A. I did.

Q. That was the 6th of March, 1947?

A. I believe it was.

Q. That was the sole payment of \$250 which you applied on the franchise?

A. That is right.

Q. Then you made a third payment on March 13, 1947? A. I did. [227]

(Testimony of Charles P. Brewer.)

Q. And that was for the odd figure of \$494.25?

A. What is that?

Q. That was for \$494.25. That made the total payment \$994.25?

A. It did.

Q. You designated it "on franchise"?

A. I designated it that was all on franchise.

Q. Can you reconcile any sum of money that you considered to be due on a 50-50 operator's basis with the sum that you paid?

A. No, or I would have never given him the \$494 check and told them I was done.

Q. But you did give them the check?

A. I did.

Q. You want this Court to now understand that when you gave them that check you knew it was money that you did not owe?

A. I gave them the check, as far as I was concerned—you say for money that I didn't even owe to them? Yes, I do.

Mr. Bernard: Objected to, your Honor.

The Court: Sustained.

Q. (By Mr. Rankin): What was your reason for terminating the agency agreement or franchise of July 1st when you wrote your letter of July 24, 1947?

A. I don't understand that.

(Question read.)

A. Will you clarify that a little bit?

Q. Why did you terminate your franchise agreement? [228]

(Testimony of Charles P. Brewer.)

A. Why did I terminate my franchise agreement?

Q. I have asked you three times, Mr. Brewer.

A. I am trying to understand the question.

Q. Yes. I think it is very simple. Why did you terminate your franchise agreement of July 1, 1946?

A. Because I figured their word was no longer good, nor would they live up to it.

Q. What word do you refer to?

A. To the modification of the contract.

Q. In what particular?

A. On the 50-50 basis.

Q. That is, Paragraph 5 of the contract which calls for the 80-20 basis they had told you, under your theory, would be divided on a 50-50 basis?

A. They did.

Q. And, when they didn't live up to that, that is the reason you canceled your contract?

A. That is entirely the reason.

Q. What do you mean, entirely?

A. There was no other reason.

Q. That modification, as you term it, occurred in November, 1946?

A. It did.

Q. Just what was that modification?

A. That modification was to break off from the 20 per cent because the business would not cover it, and it would be split—— [229]

Q. What was the modification, not its effect, but what was the modification?

A. That they would split with me the net profit, if any, 50-50.

(Testimony of Charles P. Brewer.)

Q. Did Mr. Sibert talk to you anything about taking money home? A. Not especially.

Q. Did he say that when you took any money home, if you remitted the same amount to him you could go on, using the balance in the establishment of your business? A. Not in those words.

Q. Did he say that in substance?

A. He said if I got a dollar he would get a dollar.

Q. Was any provision made in the agreement that you describe for building up the business?

A. Yes.

Q. What was to be devoted to building up the business?

A. If you are speaking of the Eastern Oregon run——

Q. No, I am speaking of the business generally.

A. I was to use the money that I started the business on and what I could glean out of it as we built the business up.

Q. What you could what?

A. Glean out of the profits.

Q. How much could you glean out? How much could you devote to building the business up, yourself?

A. Well, everything that I could get out of it.

Q. You were going to take all the money you could get out of [230] the business, except what you took home, and then the additional amount that you were to pay Paramount, is that it?

(Testimony of Charles P. Brewer.)

A. I don't understand it. Repeat that, please.

Q. You say that you were going to pour back into this business whatever you did not need for yourself and Paramount? Is that right?

A. That is right.

Q. So that if you took a dollar home, then you were going to give Paramount an equal amount of money, and the balance you were going to use in the establishment of your agency. Is that correct?

A. I don't understand just what you mean in this respect. 50 per cent of the net profits was to be split, yes.

Q. Then, your answer to my question is "No," is it?

A. That is what I am afraid of. I was trying to understand.

Q. You need not be afraid.

A. I want to understand it before I say so.

Q. So, your answer is "No"?

A. All right.

Q. When you sent in your letter of July 24, 1947, your letter of termination, why didn't you give the 90 days called for in the contract?

A. Because I knew if I gave them that 90 days, they would move in here with a dozen men and take over possession of everything in sight, and I would be left sitting here broke. [231]

Q. You knew of that provision in the contract?

A. I did.

Q. You purposely avoided it for the reason you have just stated?

A. Yes.

(Testimony of Charles P. Brewer.)

Q. In reference to the June accounting of 1947, do you recall whether or not Mr. Hilts and Mr. Sibert talked over this whole matter with you at that time?

A. They never pulled an accounting.

Q. Did you see them on June 17th?

A. They never pulled an accounting on June 17th.

Q. Well, to make this very short: Did you hear Mr. Sibert and Mr. Hilts testify about what happened on June 17th? A. I did.

Q. What they have said is not correct?

A. Right.

Q. When was that accounting had, then?

A. It was some time after the 25th day of June. Excuse me. Hilts came back from Spokane, got into the office with keys that I had left, got his rough draft or whatever he pulled, took it to California and called Mr. Sibert's home at nine o'clock at night. I never did see that paper.

Q. You never saw what paper?

A. The final draft.

Q. Did you ever see any statement of the business done to [232] June 30, 1947? A. I did.

Q. Where was that?

A. That was in the office, here in Portland, around July 9th or 10th.

Q. Did you go over the figures then with Hilts?

A. No, not completely. I glanced at them and did not approve of them.

(Testimony of Charles P. Brewer.)

Q. You made a payment?

A. I made a payment.

Q. Why did you make a payment if you did not approve of it?

A. Because Mr. Hilts told me they were very much in need of money, and he would like to take some money home and couldn't I give him a check to take back.

Q. So you gave it to him out of charity towards the corporation? A. No charity.

Q. Why did you pay it if you did not owe it?

A. Because I was still in debt a certain amount of money to Paramount and any money that I gave him was to apply on that debt.

Q. Referring to Exhibit No. 36, can you turn to it there? A. I have it.

Q. Is that ink endorsement there of a payment of \$259.61 your endorsement?

A. It is. [233]

Q. You gave Mr. Hilts a check——

A. ——for that amount. I did.

Q. ——for that amount? A. Yes.

Q. That was \$256.61, wasn't it?

A. Check No. 413, \$259.61, it says here.

Q. \$259.61? A. Yes.

Q. Now, you testified on direct examination, I believe, that you determined to go into business for yourself on the 15th day of August. You meant July, did you not?

A. I believe I said somewhere around the 20th or 25th of July.

(Testimony of Charles P. Brewer.)

Q. That is July? A. Yes.

Q. Who owned this business from August 1, 1947, to August 27, 1947?

A. The assumed name was in my wife's name, but we owned it.

Q. I didn't ask you that question.

A. We owned it.

Q. "We?" A. My wife and I.

Q. Did your wife understand that she owned it?

A. She certainly did.

Q. Did you understand that you had an ownership in it, too? A. I did. [234]

Q. Why did she make the record that she was the sole owner of it?

A. An assumed name blank, that is filled out regardless of whatever business you go into; you have to file an assumed name certificate.

Q. That does not answer my question. When you had a part-ownership in it, why did you have your wife sign that she had the ownership alone?

A. I was busy working. I didn't want to take the time off and go through all the red tape that there may be connected with it.

Q. You know that record was false?

A. It was not false.

Q. You had an ownership in it, you say?

A. I could have an ownership in it. There is a community property law in the State of Oregon.

Q. You did have an ownership in it, you say?

A. I did.

(Testimony of Charles P. Brewer.)

Q. Why didn't you file it?

A. Whatever is hers is half mine, isn't it?

Q. Why didn't you make a recording to that effect?

A. The assumed name did not call for that.

Q. The blank calls for it. Look at it. "True Names * * * of the persons conducting, having an interest in." It calls for the names of all parties who are interested in the business.

A. My daughter is interested in it. [235]

Q. How old is she?

A. She is fourteen.

Q. Why didn't you put her on the assumed name certificate?

A. Because we did not consider it necessary.

Q. It was not done, I take it, for the reason that you did not want Paramount to know that you were going into a competitive business?

A. They would have known I was going in with her name or mine or both.

Q. You mean by that, even if she did file the certificate by herself, they would know you would be back of it?

A. They would know or anybody else would know that it was our business.

Q. As a matter of fact, Mr. Brewer, you intended to go into this business long before the 25th or anywhere near the latter part of July, didn't you? A. I didn't.

(Testimony of Charles P. Brewer.)

Q. You intended to take over the business of Paramount Pest Control Service because you were the only person that the customers of Paramount knew?

A. That is not so.

Q. Consequently, you placed your order for business cards with your printer as early as the first part of July, 1947, didn't you?

A. If that is on the statement, I can't help it. I don't remember [236] any dates.

Q. Do you recall that as early as July 7, 1947, you placed Order No. 8564 with Allard J. Conger, doing business as Conger Printing Company, on the East Side, for 1500 business cards, in the name of Brewer's Pest Control?

A. I don't remember dates.

Q. You don't remember what?

A. I remember that I ordered cards from him some time, any time up to and including now, from Conger's. I don't remember any dates.

Q. What were those cards? What did they say?

A. Just said "Brewer's Pest Control" with the representative's name on it, if they are business cards you are speaking of.

Q. Did you not, on the same date, July 7, 1947, enter Order 8561 for service orders?

A. I don't know.

Q. Will you say you didn't?

A. I said I didn't know.

Q. Don't you know what you did? You have testified about other details here.

(Testimony of Charles P. Brewer.)

A. You are asking me for dates. I don't know dates.

Q. I am asking you if you put in service orders to——

A. I put in service orders, yes.

Q. You put in an order, I mean, to this very printer for service order forms, didn't you? [237]

A. I did.

Q. Did you not, on July 7, 1947, or before the date of your termination of this agreement, put in Order 8522 to Allard J. Conger for receipts?

A. I don't know.

Q. Why don't you?

A. Because I don't know what date I put it in.

Q. I said on any date before your termination?

A. I put in an order. I don't know the date.

Q. Was it before your letter of resignation?

A. I don't remember.

Q. You say you don't remember? You did not—
Would you say you did not?

A. I wouldn't say.

Q. Did you, on or about July 7, 1947, or at any time prior to your letter of resignation, place with Allard J. Conger Order No. 8503 for a large number of service slips? A. I don't know.

Q. Were not all of these orders put in long before your payment of July 9, 1947, of the \$259.61?

A. I don't know.

Q. At the time you put in these orders or made that payment, did you tell any member of the Para-

(Testimony of Charles P. Brewer.)

mount Pest Control Service that you were preparing to take over this business yourself?

A. I did not. [238]

Q. Why not?

A. I was not preparing to take over any business.

Q. What were you doing with these orders?

A. If I had placed the orders, it would have been going into business.

Q. And if you had placed the orders and if you were intending to go into business, why wouldn't you tell Paramount Pest Control Service, if you were honest about it?

A. Would it concern Paramount if I went into business?

Q. Why, definitely.

A. I had told both Hilts and Sibert I would go ahead during the month of July, carry it during the month of July.

Q. Carry what?

A. Carry the business during the month of July.

Q. We will come back to that in a moment. But why didn't you tell them you were preparing to go into business for yourself? You knew you were?

A. I told Hilts I would not get out of the pest control service when I told him that I was through with Paramount, end of July.

Q. Did you not want, by these forms that you were getting out, these business cards, service or-

(Testimony of Charles P. Brewer.)

ders, receipts and slips, want the customers of Paramount Pest Control Service to think this was identically the same service that was going on except with the change of name?

A. I didn't want them to think anything bad about anybody. [239]

Q. That is not my question.

A. I didn't understand your question.

Q. I think you did.

(Question read.)

A. No, I didn't.

Q. But did you not hand to this printer the forms of Paramount Pest Control Service, with corrections on the Paramount forms to conform to your new proposed business?

A. Yes, I probably did.

Q. You know you did, don't you?

A. All right, I did.

Q. Why didn't you say so?

A. Because I didn't understand just about your dates there.

Q. Didn't you order them in the early part of July, 1947, for the purpose of having them on hand when your resignation became effective on August 1, 1947?

A. I don't know the exact date that I ordered them.

Q. Didn't you order them to have them on hand so you could take over this business?

A. I did have them on hand.

(Testimony of Charles P. Brewer.)

Q. Now, then, can you give the Court a very much better idea of when you determined to take over this business?

Mr. Bernard: Object to that, your Honor—if the Court please. He is assuming a state of facts the witness has not testified to. [240]

The Court: He may answer.

(Question read.)

A. Well, I can't give the date.

Q. Give the circumstances.

A. I told Hilts around July 9th or 10th, when he filled out this statement that he presented to me——

Q. (By Mr. Rankin): I am not asking you what you told Hilts. I am asking you for your mental process when you determined to take over this business.

A. I don't know. I am trying to tell you when I more or less started to make up my mind. I don't know the exact time.

Q. When did you make up your mind?

A. I don't know the exact date, but it was made up completely by the 20th to 25th.

Q. Were you incurring the expense of all these orders without having made up your mind that you were going to take over this business?

A. If they were placed by that time, then, I was taking on the bills for it personally.

(Testimony of Charles P. Brewer.)

Q. Then if they were placed as early as July 7th, how long before that would you say you made up your mind?

A. Possibly I could have done so when I told Sibert I was through after the end of July.

Q. Through where?

A. Through with the company. [241]

Q. You told you were going on through during July?

A. I told him I would run it during the month of July.

Q. Yes. When did you and your wife discuss the matter of terminating your agency?

A. I don't remember the date; some time in July.

Q. It was not until July that you and your wife discussed it?

A. Nothing definite, no.

Q. When was it first suggested between you and Mrs. Brewer that you terminate your agency?

A. When I told Sibert I would stay with it during the month of July.

Q. Wasn't it previously discussed with her?

A. No.

Q. Will you please answer my question? It will save a lot of time. When did you and your wife first discuss the termination of this agency?

A. After I had told Sibert that I would carry on the business during July.

Q. What date was that?

A. It was some time around the end of June, after the first day of July, in his home in Oakland.

(Testimony of Charles P. Brewer.)

Q. When did you discuss with Mr. Duncan that you were going to take over this business?

A. You keep referring to taking over the business. I didn't take over the business. [242]

Q. What did you do?

A. I went into business for myself.

Q. Isn't that just another way of saying you would take over all of Paramount's business you could get?

A. No.

Mr. Bernard: Object to the question. It is argumentative.

The Court: He may answer.

A. There is lots of new business started up in the State of Oregon, and I went after that. We didn't take over anybody's business.

Q. (By Mr. Rankin): Do you know whether or not you are under obligation not to solicit?

A. I don't know about anything concerning that.

Q. You were aware of the provision in your franchise that you were not to solicit customers of Paramount?

A. I was.

Q. Did it mean anything to you?

A. Not after they would not keep their word with me.

Q. When did you discuss going into business for yourself with Rightmire?

A. I told him I was going into business some time around the first of August.

Q. When did you tell him you were going into business?

A. Some time around the first of August.

(Testimony of Charles P. Brewer.)

Q. And he did not know prior to that, prior to the first of [243] August, that you were going into business for yourself?

A. As far as I knew, he didn't.

Q. Then you would be the only one that would tell him, or would your wife?

A. I would have told him.

Q. You did not take it up with Rightmire until August 1st, is that right?

A. I don't know just the exact date.

Q. You have been pretty definite in all other things.

A. I know the last week of July he was on vacation. I didn't see him the last week of July.

Q. That may be, but didn't you talk it over earlier in July, before he ever went on his vacation?

A. I don't remember.

Q. And as important a matter as your breaking your franchise and going into business for yourself does not leave an impression on you as to when you told Rightmire you were going into business?

A. It does not.

Q. When did you discuss with Merriott the fact that you were going into business for yourself?

A. I think it was around the first of August.

Q. So, while you placed all these orders for Brewer's Pest Control, you did not lay any grounds for the servicing that you were going to require with any employees that you subsequently had until August 1st, 1947? [244]

(Testimony of Charles P. Brewer.)

A. I would have done all my own service work if I hadn't had any employees.

Q. I say, you did not make any arrangement until August 1st, 1947?

A. No definite arrangement.

Q. Did you make any indefinite ones?

A. I don't know. There may have been a word said, but there was nothing deliberately specified.

Q. Sort of a general understanding?

A. No, I wouldn't say that.

Q. Was "Brewer's Pest Control" in the telephone book,—Was its number in the telephone book when you left the services of Paramount Pest Control Service? A. No.

Q. How would all the customers that you had previously served in the name of Paramount know where to find Brewer's Pest Control?

A. They would have had to call Brewer's Pest Control.

Q. Individually? A. Right.

Q. Did you tell those customers to call you at your home number?

A. I only talked to a very few customers.

Q. Answer the question.

A. What customers?

Q. Paramount's customers.

A. I never told Paramount's customers to call me at any time. [245]

Q. Did you ever let them know the number on these 1500 business cards that you were having printed to put out? A. I did.

Mr. Rankin: No further cross-examination.

(Testimony of Charles P. Brewer.)

Redirect Examination

By Mr. Bernard:

Q. I want to ask you one or two questions. Did you order any cards, forms or anything prior to the time you had been notified that on the first of July you would have to go back on the 20-80 basis?

A. I did not.

Mr. Bernard: I think that is all.

Mr. Rankin: That is all, your Honor.

(Witness excused.)

The Court: I am sorry to have to make a little explanation about my own circumstances. I imagine it won't be satisfactory to you gentlemen. Mr. Lyon is here from Los Angeles. I have to hear him some time today, as well as opposing counsel in a patent case. Then tomorrow I cannot hear you at all, due to an emergency matter that has arisen in the court. I can resume this case on Friday and continue over to Saturday, if that is necessary.

Mr. Bernard: That will be quite satisfactory to me. In fact, for reasons of my own, I was going to have to ask the Court [246] not to run too late this afternoon anyway.

The Court: Mr. Rankin, may we have your concurrence in resuming this matter on Friday?

Mr. Rankin: I know how busy this Court is. While, as the Court correctly prophesied, it is not satisfactory, it will have to be done because I know

the compulsion that the work of this Court is under. If your Honor will just designate when to report, that will be satisfactory.

The Court: We will resume Friday morning and, if necessary, run Saturday as well.

(Thereupon, an adjournment was taken until 10:00 o'clock a.m. Friday, January 23, 1948.)

Court reconvened at 10:00 o'clock a.m., Friday, January 23, 1948, pursuant to adjournment.

ALLARD J. CONGER

was thereupon produced as a witness on behalf of plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rankin:

Q. Your name is Allard J. Conger?

A. Yes.

Q. Where do you live, Mr. Conger?

A. 2030 Southeast Harrison, Portland.

Q. What is your business?

A. Printing and lithographing, sir.

Q. How long have you been so engaged?

A. Since 1918.

Q. Do you know Mr. Brewer?

A. Just as a casual customer, yes.

Q. When did you first know him?

A. I believe—Oh, I think it was the beginning of 1947, as far as I can recall.

Q. Did you ever do any printing for him?

A. Yes, sir.

(Testimony of Allard J. Conger.)

Q. What did you do?

A. Oh, various small forms, cards and stationery.

Q. Have you any record of those jobs?

A. We always keep a complete record of all work done.

Q. I would like to hand you, Mr. Conger, certain exhibits in this case known as 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74 and 75, and ask you if you can identify any of those exhibits and your having anything to do with them?

A. Yes. Those are all checks that cleared through our bookkeeping department and the work here, I believe, was all produced in our plant.

Q. When was that done?

A. Well, it was during 1947.

Q. Can you give the Court a more specific date?

A. I will have to refer to our records here in order to do that. Succeeding dates, July 7th—

Q. Did he place an order with you on July 7th?

A. That is the date the order was placed.

Q. What order was placed on July 7th?

A. Service orders, 2,000 service orders.

Q. What were those? Can you identify among the list of exhibits the one you classify as a service order?

A. Yes, sir. It is this form here, and so states on the heading, "Service Order."

Q. Can you refer to an exhibit number? There is a stamp on it in the lower right-hand corner, I believe.

A. Exhibit No. 70. [249]

(Testimony of Allard J. Conger.)

Q. Exhibit No. 70? A. Yes.

Q. There were two thousand of those?

A. Yes.

Q. What was the next order?

A. The next was another order on July 7th, receipts in duplicate.

Q. Do you find among those exhibits a copy of a receipt that you printed? A. Yes, sir.

Q. What exhibit number is that?

A. Exhibit No. 67.

Q. Exhibit No. 67? A. Yes.

Q. How many of those receipts did you print?

A. 2,000 sets, in duplicate.

Q. What was the next order?

A. The next order was also July 7th was 5,000 service slips.

Q. 5,000 service slips. Do you find any exhibit number there covering service slips of that character that you printed? A. Yes, sir.

Q. What exhibit number is it?

A. Exhibit No. 68.

Q. Exhibit No. 68? A. Yes. [250]

Q. What other order, if any, did you receive from Mr. Brewer?

A. There is quite a few here on succeeding dates. July 7th, 2,000 statements; July 11th, I should say.

Q. Were there any more on July 7th?

A. No, that is all entered on July 7th.

Q. I direct your attention to Order 8564 for 1,500 business cards. What was the date of that order? A. That was July 7th.

(Testimony of Allard J. Conger.)

Q. July 7th? A. Yes, sir.

Q. How many of those business cards did you print? Is that the correct number, 1,500?

A. 1,500, sir.

Q. Do you find any exhibit number for a business card among those exhibits that were handed to you? A. Yes, sir.

Q. What is the exhibit number of that?

A. No. 69.

Q. 69? A. Yes.

Q. When did you deliver the wares or goods made under these July 7th orders?

A. They were delivered at different dates.

Q. When was the first date of delivery?

A. The first date of delivery was July 14th on the 1,500 cards. [251]

Q. Those were the business cards represented by Exhibit 69? A. Yes, sir.

Q. Were all of those products delivered at various times thereafter?

A. Yes, sir, various dates.

Q. Did you render him a statement for them?

A. They were rendered, yes, later in the month.

Q. But you did render statements?

A. Yes.

Q. And were they paid?

A. Very promptly paid, yes.

Q. And the checks that are in evidence there are the checks you received in payment for the printing service that you have described, is that correct?

A. Yes, that is correct.

(Testimony of Allard J. Conger.)

Q. How did you get the forms from which to do that printing that you have described?

A. They were furnished by Mr. Brewer.

Q. Have you those forms?

A. I may have some of them.

Q. Will you produce all you have, please?

A. There (indicating) is a copy of the business card, service order and receipt. That is all I have with me.

Q. May I see them? A. Yes. [252]

Q. Mr. Conger, I would like to hand you the card of the Paramount Pest Control Service with Charles Brewer, as manager, and ask you if that is a form that you refer to as having used from which to draw Mr. Brewer's business cards?

A. Not necessarily. That was a copy of their card. I believe that was brought along more for style. The pencil written copy here, I believe is the one that was followed, instead of the type.

Q. But he offered it to you at the time for the style of the card? A. That is right.

Mr. Rankin: We wish to offer that in evidence.

The Court: Take everything over to Mr. Bernard. You have not seen these things, have you?

Mr. Bernard: No, we have not, your Honor.

Mr. Rankin: I had not seen them before, either.

Q. I hand you what purports to be a copy of a service order for Paramount Pest Control Service with "Paramount" and "Service" and other matters stricken out and "Brewer's——" I don't know what that is. "Brewer's" is written over it.

(Testimony of Allard J. Conger.)

I will ask you if that material was given to you—if that is the material that was given to you, as you describe, for the purpose of drawing Mr. Brewer's contract form.

A. Yes. This particular form was used as copy, with the changes indicated. [253]

Mr. Rankin: We offer that in evidence.

Q. If I understand your testimony correctly, you said you had also drawn a large number of receipts, and I hand you this receipt, originally of the Paramount Pest Control Service, with "Paramount" and "Service" stricken out and "Brewer's Statewide" Pest Control or "Brewer's Statewide" written over it, and ask you if this is the form from which you made Mr. Brewer's receipts?

A. Yes, sir, that is the case. That is the copy that was used.

Mr. Rankin: We offer that in evidence.

Q. Have you had any talk with Mr. or Mrs. Brewer since the first of the week?

A. He was in the office, I believe, yesterday.

Q. Did he see you? A. Yes.

Q. What did he want?

A. He wanted to confirm the date of the purchase order of these items.

Q. Did you confirm it with him?

A. I did.

Q. Was there any other conversation?

A. I believe not.

Mr. Rankin: That is all. You may cross-examine. [254]

(Testimony of Allard J. Conger.)

Cross-Examination

By Mr. Bernard:

Q. When did you say Mr. Brewer was in?

A. Yesterday.

The Court: Do you have any objection to them?

Mr. Bernard: No, I have not, your Honor. I have no objection.

The Court: They are all admitted. Do you want to give them exhibit numbers before Mr. Bernard cross-examines?

(Copy for business cards furnished Conger Printing Company thereupon received in evidence and marked Plaintiff's Exhibit No. 78.)

(Copy furnished Conger Printing Company for service order thereupon received in evidence and marked Plaintiff's Exhibit No. 79.)

(Copy furnished Conger Printing Company for receipt thereupon received in evidence and marked Plaintiff's Exhibit No. 80.)

Mr. Rankin: The service order is here; the receipt is here; the business card is here, but I do not find the service slip. We had it here and he described it as 5,000. Where has it gone? Have you got it over there?

Mr. Bernard: No, we haven't got it. [255]

A. I believe it is in this bunch. I don't believe I gave you a copy of the service slip. I do not have that one here.

(Testimony of Allard J. Conger.)

Mr. Rankin: You do not have a copy of that?

A. No, I just have the three. The three was all I brought in.

Q. (By Mr. Bernard): Would you examine Plaintiff's Exhibit No. 79 and tell whose handwriting that is up at the top?

A. I believe that is my office manager's handwriting.

Q. As a matter of fact, you did not take this order at all, did you? One of your employees did?

A. I believe that is correct.

Q. That order was put in on what date?

A. July 7th.

Q. Then the order placed on July 7th was placed with one of your employees?

A. I believe that is right.

Mr. Bernard: That is all.

Redirect Examination

By Mr. Rankin:

Q. You then printed these slips in accordance with the order, did you? A. That is right.

Q. And Mr. Brewer received them?

A. Yes, sir.

Q. He made no objection to them? [256]

A. No, sir.

Q. And the only direction you had was that which you have indicated as to how those orders were to be compiled? A. That is right.

Q. Did Mr. Brewer sign your order book in any way?

(Testimony of Allard J. Conger.)

A. We keep a record of receipts in the office. I haven't those available here.

Mr. Rankin: That is all. Just a moment. For your information, after this is all over and the Court has finished with them, I will be glad, on your request, to have these returned to you for your files, if possible.

A. Thank you. It is not too important if they are not returned.

The Court: That is all. Step down.

(Witness excused.) [257]

G. H. HANSEN

was thereupon produced as a witness on behalf of plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rankin:

Q. Give your name to the Court, please.

A. G. H. Hansen.

Q. Is that P. H.? A. G. H.

Q. Where do you reside?

A. In Portland.

Q. What is your occupation?

A. I am District Agent for the U. S. Fish and Wild Life Service.

Q. How long have you been such?

A. I have been in Oregon since September, 1945.

Q. Were you in that service prior to that date?

A. I have been in that service since 1931.

(Testimony of G. H. Hansen.)

Q. Do you know Charles P. Brewer?

A. No, I don't. I don't recall ever having met him.

Q. Do you have anything to do with a common poison known as 1080? A. Yes, we have.

Q. I should not say "common." It is not. Do you have anything to do with a poison commonly known as 1080?

A. Our field men, as well as myself, after being authorized [258] by our central office, are permitted to use it under certain circumstances, under proper regulations within the State of Oregon.

Q. Are you the head of the department here?

A. I am the head of that department that uses that material.

Q. Is it a common poison on the market?

A. No, sir, it is not.

Q. How do you buy it?

A. We requisition it, on approval from the central office, from our Pocatello supply depot.

Q. There is testimony in this case, given by Mr. Brewer here, that in July of 1947 he went to the Fish and Wild Life Department in the Weatherly Building and purchased one pound of a poison known as 1080, for which he paid \$8.00.

Do you find any record of such a purchase?

A. We are not permitted to sell 1080.

Q. Well I would like to get an answer to that question. Do you find any record of his having made a purchase?

A. No, there is no record in our office.

(Testimony of G. H. Hansen.)

Q. You say you are not permitted to sell 1080?

A. That is correct.

Q. Will you explain to the Court why?

A. 1080 is definitely a hazardous poison to handle. The research people don't know too much about it yet. So far as we know, there is no antidote and it is not supposed to be available [259] to the general public until more is known about this poison as it is used.

Q. Are there means by which established concerns can purchase that poison?

A. I understand that established persons can purchase it direct from the company that manufactures it.

Q. You were previously advised by us, were you not, that Mr. Brewer had claimed to make this purchase from your department in the Weatherly Building? A. Yes.

Q. What department is that in the Weatherly Building?

A. The Fish and Wild Life Service office in the Weatherly Building is our regional office, and they handle all fiscal matters that pertain to the six or seven western states in the Northwest.

Q. Do they have 1080 on hand to purchase there?

A. They don't handle 1080 in the Weatherly Building.

Q. Did you make inquiry of the office to ascertain whether that is correct or not?

A. I called them last night and they have no records of ever having it over there.

(Testimony of G. H. Hansen.)

Q. Suppose an application had been made at the Weatherly Building for the purchase of 1080, what would have happened to that application?

A. That would have been referred to our office over here in [260] the Pioneer Post Office Building.

Mr. Rankin: That is all.

Cross-Examination

By Mr. Barnard:

Q. Was your office formerly in the Weatherly Building?

A. Our office was formerly in the Weatherly Building.

Q. When did you move?

A. It will be two years this April.

Q. How many employees are there over there in the Weatherly Building?

A. We have at the present time two office girls and Mr. Boomhower who is in charge of law enforcement, and Al Moore who is with the research division.

Q. What men were over there in July, 1947?

A. The same men that I have just named.

Q. Those are all of the men that were over there in July?

A. That is correct.

Q. Is there a man by the name of McDonald over there?

A. McDonald?

Q. Yes.

Q. There is a McDonald in the Weatherly Building, not in our office.

(Testimony of G. H. Hansen.)

Q. I meant to ask you about the personnel over there in the Weatherly Building. What men were there in July, 1947, in the Weatherly Building?

A. I don't know all the employees in the Weatherly Building.

Q. About how many men are employed over there?

A. Most of them are bookkeepers. There are, I think, four or five regional inspectors and the regional director and the assistant regional director.

Q. There was a man by the name of McDonald over there? A. Yes. He is still there.

Q. What is his position there in that office?

A. He is in charge of Federal refuges in this region.

Q. What do you people use this 1080 for?

A. We use it on rat control work and predatory animal control work.

Q. You do not sell any of it? A. No.

Q. Or are not supposed to sell any of it?

A. We don't sell any, no.

Q. Did you ever get any of it over there?

A. No.

Q. This 1080, in what shape does it come to your office?

A. The packages that we have received are half-pound containers with the manufacturer's label on them.

Q. What manufacturer?

A. The Monsanto Chemical Company.

(Testimony of G. H. Hansen.)

Q. I am not going to take this out of the sack, but look at that can and that sack and tell if that is the kind of cans [262] this comes in to your department?

A. Yes, the kind of cans which the manufacturer shipped it in.

Q. And the can—the kind that come to your office?

A. Yes, sir.

Mr. Bernard: Do you want to look at it?

Mr. Rankin: Will it hurt me if I look at it?

A. No, sir, it won't hurt you.

Mr. Bernard: That is all.

Redirect Examination

By Mr. Rankin:

Q. This can says, "Don't breathe dust or get on skin." That is true, is it?

A. Yes.

Q. Use rubber gloves?

A. That is recommended, yes.

Q. And that is the Monsanto Chemical Company?

A. The Monsanto Chemical Company.

Q. It has marked on it "Fatal Poison" with the skull and crossbones and "Fatal Poison" all in red.

A. Yes.

Q. Is Mr. McDonald, to your knowledge, permitted to sell 1080?

A. No, to my knowledge he is not.

Q. Would you know if he were permitted to sell it?

A. Yes, I would be advised if he was permitted to handle it or sell it. [263]

(Testimony of G. H. Hansen.)

Q. Have you ever been advised that McDonald has any right to sell 1080? A. No, sir.

Q. There is one question I should have asked you on direct examination and, with the Court's permission, I would like to ask it now.

Did Mr. Brewer come into your office in the last few days, to your department?

A. The young ladies in the office report Mr. Brewer was in yesterday, day before yesterday.

Q. For what purpose? A. To obtain—
Mr. Bernard: That would be hearsay.

Mr. Rankin: He is in charge of the office.

The Court: Answer the question.

A. To obtain some 1080.

Mr. Rankin: Did he get it?

A. No, he didn't get it.

Mr. Rankin: That is all.

Recross Examination

By Mr. Bernard:

Q. Can you tell me the name of any of the other men over there in that office?

A. In the Weatherly Building?

Q. Yes. [264]

A. Well, I don't think I would be permitted to, under the regulations of the Department. I don't think I would be. I don't think I should answer that.

Q. Can you tell me about how many of them there are over there?

(Testimony of G. H. Hansen.)

A. There are four or five regional inspectors; there is the administrative office; there is the regional directors and the assistant regional director and some clerical help.

Mr. Bernard: That is all.

Mr. Rankin: That is all.

(Witness excused.) [265]

C. W. FISHER

was thereupon produced as a witness on behalf of plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rankin:

Q. Your name is what? A. C. W. Fisher.

Q. Where do you live, Mr. Fisher?

A. 2400 Tenth Street, Berkeley, California.

Q. What is your business?

A. Pest control.

Q. By whom are you now employed?

A. By the Sully-Van Corporation.

Q. Were you ever employed by Paramount Pest Control Service? A. Yes, sir.

Q. You were in the employ, were you, of the Paramount Pest Control Service in July, 1947?

A. Yes, sir.

Q. Did you at that time see the defendant, Charles P. Brewer? A. I did.

Q. Where did you see him?

(Testimony of C. W. Fisher.)

A. Saw him at the Paramount Pest Control office, 519 Northwest Park in the evening, around 5:00 p.m., July 30, 1947.

Q. Did you see him anywhere else that evening?

A. Yes. [266]

Q. Where?

A. We had dinner and spent the entire evening together, Mr. and Mrs. Brewer and myself.

Q. Whereabouts?

A. First, we drove from the office out to his home here in Portland, on 28th Avenue, I believe it is, and, on our arrival there, Mrs. Brewer and Mr. Ray Rightmire were in the kitchen visiting, and Mr. Brewer was very happy to see Mr. Rightmire there because he had just returned from a few days' vacation.

Q. I should ask you, Mr. Fisher: Are you any relation to any of the officers of the Paramount Pest Control Service?

A. Yes, sir, I am.

Q. What relation, and to what member?

A. A brother to G. H. Fisher, one of the owners of the Paramount Pest Control Service.

Q. Did you, on this evening that you describe in July, when you met Mr. and Mrs. Brewer and Mr. Rightmire, have any discussion with those gentlemen and that lady?

A. Yes, sir.

Q. Did that discussion relate to why Mr. Brewer was leaving Paramount?

A. It did.

Q. Will you begin at the beginning and briefly, but fully, as fully as necessary, tell what was said

(Testimony of C. W. Fisher.)

in relation to Paramount and their leaving Paramount? [267]

A. The first discussion—Mr. Rightmire stated that he was glad he had taken a vacation because if he hadn't taken it then he would not have had it as a member of the Paramount Pest Control Service, and there was a little discussion at that time. Mr. Rightmire left, and Mr. and Mrs. Brewer and I returned to the Roosevelt Hotel, where I was staying, and we had dinner at the Roosevelt and, immediately after dinner, we retired to my room there.

Q. How long was it discussed with Mr. Rightmire in the Brewer home?

A. Just a few minutes, ten or fifteen minutes, possibly.

Q. Do you know what he was saying there?

A. He was telling of his vacation trip that he had just returned from.

Q. Whom was he telling that to?

A. Mrs. Brewer, when we arrived, and he told Mr. and Mrs. Brewer and myself about it.

Q. After you had finished your dinner, where did you go, you and Mr. and Mrs. Brewer?

A. We went to my room in the Roosevelt Hotel.

Q. About what time did you go to your room?

A. Some time between 9 and 10 o'clock.

Q. How long did they remain discussing the matter with you in your room at the Roosevelt Hotel at this time?

A. Until after midnight. [268]

(Testimony of C. W. Fisher.)

Q. Did they tell you they were leaving Paramount?
A. Yes, sir.

Q. Did they give you any reason why?

A. They did.

Q. Could you briefly give what they said regarding leaving Paramount?

A. They said that the Paramount organization, and particularly Mr. Sibert, had not lived up to his promises to them and that they were leaving the organization and, within the eyes of Paramount, they would be the worst so-and-so's in the world as of August 1st because they were not only leaving the organization and going into a competitive business, but they were also taking all the Paramount employees with them into their business.

Q. Did you ever see Mrs. Brewer in the office of the company?
A. Yes, sir.

Q. What was she doing there?

A. Done the office work, bookkeeping and answering the telephone and so forth.

Q. Did she engage in this conversation you are describing?
A. She did.

Q. Did you know who were in the employ of Paramount at the time they said they were taking the employees with them?
A. Yes.

Q. Who were they? [269]

A. Mr. Carl Duncan and Mr. Raymond Rightmire and Mr. Merriott.

Q. Do you know whether or not, from any subsequent knowledge that you had, they did go with Mr. Brewer?
A. Yes, sir.

(Testimony of C. W. Fisher.)

Q. What else, if anything, was said regarding their leaving? May I strike that, please?

You said they were taking the employees with them. Was anything else said about the date on which they would leave Paramount? A. Yes.

Q. What was that?

A. They said they were and they had been collecting all the money that was on the books that they could possibly collect and that if, on August 1st, there was more than a dollar or two in Paramount's account they would be very lucky.

Q. Who would be very lucky?

A. Paramount Pest Control Service.

Q. Do you know how much was in the Paramount Pest Control account? A. No, sir.

Q. Was there anything else said about Paramount Pest Control conditions after they would leave? A. No, sir, not that I recall.

Q. Why did they select August 1st as that time?

Mr. Bernard: Objected to as calling for a conclusion [270] of the witness.

The Court: Answer.

A. Will you repeat the question?

Q. (By Mr. Rankin): Why was August 1st mentioned? You say "after August 1st." Do you know why August 1st was mentioned?

A. May I explain it in this manner?

Q. If you wish.

A. My arrival here was purely coincidental. I had been traveling throughout the State of Washington and had just arrived in Oregon, establishing

(Testimony of C. W. Fisher.)

distributors for Sully-Van. Mr. Sibert and Mr. Fisher own most of the stock in that corporation. At that time I was working in that capacity and, when I arrived here on July 30th, Mr. Brewer asked me how long it had been since I left the Oakland office, and I told him approximately two and a half weeks, so he said, "You don't know the news, then."

I told him I didn't and he said he had sent a letter of resignation, previous to the date of my arrival, to the Oakland office, which would take effect on August 1st, 1947.

Q. And that is the reason August 1st was mentioned? A. Yes.

Q. Was anything said about the condition Paramount would be in after the bank account had been reduced and the employees taken away, as to their rehabilitation? What was said on that score? [271]

A. It was said that Paramount would be in no position to take care of their accounts for some months to come.

Q. Who said that?

A. Mr. Brewer, because they would not have any equipment or stock, nor would they have any experienced personnel in this area and, not being familiar with the accounts and not having the equipment that our former employees had, it would be a few months before we would ever be able to regain our status, at that particular time.

Q. Was anything said about where they were establishing their office? A. Yes.

(Testimony of C. W. Fisher.)

Q. Where was that?

A. In the home, here in Portland.

Q. What did they say about that?

A. Well, about all there was—they would have—they would establish their business in their home temporarily.

Q. You mentioned something about equipment. What did they say about equipment?

A. Well, that they intended to keep the equipment and chemicals until they had been paid for that equipment, and that the usual procedure with Paramount would be that Paramount would take some time to do that, and they were going to keep it until they had received their money that was due for that equipment and chemicals. [272]

Q. Did they tell you the amount they claimed to be due from Paramount to them?

A. No, sir.

Q. Did they say whether or not they had tried to get it and had been denied?

A. Repeat the question.

Q. Did they say anything about whether they had tried to get their money and it had been denied them?

A. No, sir.

Q. Do you know of Mr. Hilts coming in, anywhere in this conversation?

A. Not this conversation, no.

Q. When did you first see Mr. Hilts?

A. Around 4:30 of July 31st in the hotel; he had registered in at that time.

(Testimony of C. W. Fisher.)

Q. That was the next day? A. Yes.

Q. Were you present when Mr. Hilts and Mr. Brewer met? A. I was.

Q. What was said in Mr. Brewer's presence?

A. Mr. Brewer was in the lobby and he called my room. A few minutes before that Mr. Hilts had called me, having just registered, and, as soon as Mr. Brewer arrived in my room, I telephoned Mr. Hilts' room and asked him to join us because Mr. Brewer had arrived. [273]

Q. What was said in his presence, Mr. Fisher?

A. Mr. Hilts, upon entering the room, walked over to Charlie and shook hands and said that this was a bombshell in their organization and particularly in the home office in Oakland, his resignation as of August 1st, and they and no one else could understand the reason for his attitude.

Q. What did Mr. Brewer say?

A. Mr. Brewer said that he supported and financed Paramount, or the Oregon territory, as long as he possibly could and he was getting out now for self-preservation.

Q. Was anything said in Mr. Hilts' presence about who might be going with Mr. Brewer in this new undertaking of his? A. No, sir.

Q. What did you do after that with respect to the equipment, if anything?

A. The following morning, August, Mr. Hilts and I went to the office and, upon arrival in the office, we found some canceling letters and complaints, cancellation letters.

(Testimony of C. W. Fisher.)

Q. Whom were those cancellation letters from, do you recall?

A. One in particular that I recall was the Hudson-Duncan Company account.

Q. Here in Portland, Oregon?

A. Yes, sir.

Q. Go ahead, please, with your statement of what you did.

A. Another complaint that I recall was the Zellerbach Paper [274] Company here.

While we were there, Mr. Hilts instructed Mr. Celsi—I believe that is the man's name in charge of the warehouse—to not permit any of the former employees into the office or into the warehouse without his consent because we had taken over from Mr. Brewer and he was no longer with the Paramount Pest Control Service and, upon this remark, Mr. Celsi said he couldn't restrain any of Mr. Brewer's men or Mr. Brewer from the warehouse because he had made the lease and had paid the rent.

There was some question, so Mr. Hilts instructed this gentleman to advise Mr. Brewer to come down to the warehouse, and that we would be back shortly after this complaint call, because that matter must be settled.

So, at approximately 2:00 o'clock in the afternoon Mr. Brewer and Mr. Duncan met Mr. Hilts and I in the warehouse and at that meeting Mr. Brewer instructed Mr. Celsi not to permit us into the storeroom until he personally had given consent

(Testimony of C. W. Fisher.)

for us to do so, so, to alleviate the responsibility placed on this man who more or less did not know just what to do, we told him we did not want access to the warehouse or any of the stuff in the warehouse until the entire matter had been settled.

Q. How long did you remain at Portland, Oregon, at this time? A. About thirty days.

Q. What were you instructed to do, if anything?

A. Primarily I took care of cancellations of contracts.

Q. You were the first man to engage in an effort to understand these cancellations?

A. Yes, sir.

Q. How long were you here as the only man doing that?

A. Mr. Hilts arrived the next day.

Q. Did Mr. Hilts work with you in trying to retain the company business?

A. In several cases, yes; not entirely.

Q. Who had the greatest number of calls to make in that regard, you or Mr. Hilts?

A. Myself.

Q. How long were you here without any further assistance except that of Mr. Hilts, in the capacity you have described?

A. Until Monday in the afternoon.

Q. What would be the date, approximately? How many days, approximately, was that?

A. I would say it was August 4th.

Q. Who came then? A. Mr. Sibert.

(Testimony of C. W. Fisher.)

Q. Did Mr. Sibert make any calls on any of these customers?

A. Not to my knowledge.

Q. Did you, at any time subsequent to that, make any calls on any other customers of Paramount Pest Control Service in an effort to retain the Paramount business? [276]

A. Yes, sir.

Q. Who?

A. Mr. Elfers and I went to the Albers Milling Company.

Q. Anybody else?

A. Mr. Elfers, Mr. Hilts and myself were the only three; we worked together.

Q. Will you describe to the Court whether or not there were many cancellations coming in following August 1, 1947, and what you did with respect to those cancellations that did come in?

A. Well, I couldn't keep up with them. The first account I called on was on Friday or Saturday, I guess, on August 1st—whatever the 1st of August was. I am a little confused there. On August 1st I called, immediately after finding the letter of cancellation, on the Hudson-Duncan people. It was sent by Mr. Lacey, so I called on that account and talked to Mr. Lacey. It is the general practice of our company, when we have a cancellation, to determine the reason for the cancellation, and I had found that they had given the account to Brewer's Pest Control. That was before noon on August 1st.

(Testimony of C. W. Fisher.)

Q. August 1st? A. Yes.

Q. Go ahead and describe in a general way—not too long or too much in detail—about what you generally did in connection with cancellations that came in, and what your investigation showed. [277]

A. I called on between twenty-five and thirty accounts, and the direct result in every instance—it resulted in better than eighty cancellations because in those twenty-five or thirty calls there were such accounts as the Safeway organization and other companies which had a number of stores that were under contract for service with our company.

Q. To summarize, what were your findings as to the cause of the cancellations?

A. The same type of service with the same servicemen, knowing the accounts that had been with Paramount, was to continue and take care of them, and they would receive the very fine service that they had had as the Paramount Company, but it would be in the name of Brewer's Pest Control instead of Paramount.

Q. I hand you, Mr. Fisher, Exhibits 54 and 55 that relate to the list of customers and ask you if these lists represent any of the customers that you had had any dealings with? You have seen them before, haven't you? A. Yes.

Q. This list of customers? A. Yes, sir.

Q. At that time, did you call any of these that are cancelled here? A. I did.

(Testimony of C. W. Fisher.)

Q. Without going into the detail of picking them out, what you describe as to their termination applies to those that you called upon?

A. The Dairy Co-op cancelled.

Q. Yes; but I say what you describe in general, does that apply to all of these?

A. Yes, in every case.

Q. There are some letters in there that seem to bear the initials, "CWF" or "C. W. Fisher." Have you looked through and determined whether those are your letters in reply to the cancellations?

A. Yes.

Q. What was your effort, and how did you go about endeavoring to hold this business?

A. Well, I would like to relate one specific instance, and that is more or less general.

Q. Yes.

A. Albers Milling Company, which had been an account of ours for several months—I called on them the morning of August 4th; it was Monday morning, with Mr. Elfers. On August 1st the account had been serviced by Brewer's Pest Control, and Mr. Flanagan showed me the service slip of Brewer's Pest Control signed by their servicemen—it was either Mr. Merriott or Mr. Rightmire, I am positive about that—that they had been serviced on August 1st.

So we inquired of Mr. Flanagan why Brewer's Pest [279] Control serviceman serviced the account when we had a contract with them and he said he

(Testimony of C. W. Fisher.)

didn't—he was not there when the service was rendered and that somebody else had signed the slip, and that he would find out at the time of the next call why they were servicing the account because, as far as he was concerned, he was under contract with Paramount Pest Control Service.

Q. Did you find any other accounts that were served by Brewer on August 1st, 2nd or 3rd, or immediately after the 1st of August?

A. Yes, sir.

Q. Do you have any idea how many of those accounts there were that were serviced immediately after August 1st?

A. Everyone I had called on, practically.

Q. Did Mr. Brewer make any appearance at the Paramount Pest Control office at this time?

A. On two or three occasions he was in to see Mr. Hilts with reference to a settlement.

Q. You were not present when those discussions were had? A. No, sir.

Mr. Rankin: You may cross-examine.

Cross-Examination

By Mr. Bernard:

Q. At this time in July when you came to Portland, July 30th, you were employed then by Paramount Pest Control Service? [280] A. No.

Q. Whom were you working for then?

A. Sully-Van Corporation.

Q. You went to work for Paramount about August 1st? A. On July 30th, I went to work.

(Testimony of C. W. Fisher.)

Q. As I understand it, out at the house that night you found Mr. Rightmire talking to Mrs. Brewer and he said he was lucky he had got his vacation, or something of the kind?

A. He said he took his vacation at that time because, if he hadn't, he would not have had it as an employee of Paramount Pest Control Service.

Q. Then you went over to the hotel, you and Mrs. Brewer and Mr. Brewer, and had dinner, and then went up to your room?

A. That is correct.

Q. Did you know up to that time that Brewer was leaving Paramount? A. Yes, sir.

Q. He advised you that he had resigned, was leaving, saying that Mr. Sibert had not lived up to his contracts with him? A. That is correct.

Q. Did there seem to be some feeling on Mr. Brewer's part? A. Very definitely.

Q. When, if you know, did Paramount Pest Control Service get control of the warehouse concerning which you have spoken?

A. I don't understand your question. [281]

Q. When did Paramount Pest Control Service procure possession of the warehouse, concerning which you have testified? Do you know that?

A. On Tuesday morning; I think it is August 5th. Mr. Sibert had met Mr. Brewer in the hotel the night before and Mr. Brewer consented to give us the keys to the warehouse the following morning.

(Testimony of C. W. Fisher.)

Q. You testified that prior to that time Mr. Brewer had been in several times for a settlement?

A. Not prior to that time.

Q. Prior to August 5th?

A. Not prior to that time.

Q. Afterwards? A. Yes, sir.

Q. Do you know anything about the negotiations back and forth that led to the surrender of the warehouse by Mr. Brewer on the 5th?

A. Only that meeting in Mr. Sibert's room at the Roosevelt. He confirmed he would give him access to it the following morning.

Mr. Bernard: That is all.

(Witness excused.) [282]

DeGREY S. BROOKS

was thereupon produced as a witness on behalf of plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rankin:

Q. Your name is DeGrey S. Brooks?

A. Yes, sir.

Q. Where do you live?

A. 5728 Northeast Fifteenth Avenue, Portland.

Q. How long have you lived there?

A. About two months.

Q. By whom are you employed?

A. Paramount Pest Control Service.

(Testimony of DeGrey S. Brooks.)

Q. Where did you live prior to the time of living here at that address in Portland?

A. Spokane, Washington.

Q. What business were you in in Spokane, Spokane, Washington?

A. I was manager of the Spokane office.

Q. Of what company?

A. Paramount Pest Control Service.

Q. How long, over all, have you been connected with the Paramount Pest Control Service?

A. About two years.

Q. When you came to Portland, Oregon, to take over the service of the company here, where were you living at that time? [283]

A. I was living at the Roosevelt Hotel.

Q. Prior to living here, where were you living?

A. Spokane.

Q. You were engaged in that work at Spokane?

A. Yes.

Q. How did you happen to come to Portland?

A. I came here the 2nd of August on a vacation with my family.

Q. When were you directed to take over the Portland office, as you describe?

A. I took over the Portland office about the 1st of September, I would say, although I arrived here on the 11th of August.

Q. You arrived here on the 11th of August?

A. The 11th of August and was put directly in charge of the office on or about the 1st of September.

(Testimony of DeGrey S. Brooks.)

Q. You were here about the 1st of August?

A. Yes.

Q. But that was on your vacation?

A. Yes.

Q. Did you meet Mr. Brewer or anyone connected with Mr. Brewer or any of these defendants on August 1st, on the 1st of August or thereabouts?

A. On the 2nd of August I met Mr. Brewer at the Roosevelt Hotel.

Q. What happened there at that time? I wish you would just [284] state what occurred.

A. I had just arrived in town with my family on vacation and was in the hotel about a half hour when the telephone rang in my room. I answered it, and it was Mr. Duncan, calling from Mr. Brewer's room.

Q. Is that Mr. Carl Duncan?

A. Mr. Carl Duncan, yes.

Q. One of the defendants in this case?

A. Yes, sir.

Q. Go ahead.

A. Mr. Duncan—I had asked Mr. Brewer to reserve a room for me, because that is how they happened to know I was coming out here, so they asked me if I would not come up and spend the evening. I didn't want to, but I agreed to later on and, after a little while, I went over to their room.

Q. What time did you go to their room?

A. I would say 7:30 or 8:00 o'clock.

(Testimony of DeGrey S. Brooks.)

Q. How long did you remain?

A. I stayed until about 9:30.

Q. Did you have any conversation with anyone there? A. Yes, sir.

Q. Who?

A. Mr. Brewer and Mr. Duncan and Rosalie Brewer, Mr. Brewer's wife.

Q. Just state what that conversation was, the detail of it. [285]

A. When I first went in there, it was sort of a social thing for a few minutes, and then Mr. and Mrs. Brewer started talking about Paramount Pest Control Service, sort of running it down in a way, and they went on for a little while. I asked them what the trouble was and he said, "You don't know?" He said, "You don't know that we and Paramount have severed negotiations?" And I said, "No."

He said, "I am not with Paramount any more," and I said, "I am sorry to hear that. What happened?" Well, he didn't tell me so much about what had actually happened. The whole trend of events was trying to discourage me against the Paramount.

Q. What did they say? What was the conversation leading to that?

A. They told me what had happened to them; that they had put all their money into this business and so forth, and Mrs. Brewer, on a number of occasions, would look over at me and say, "For

(Testimony of DeGrey S. Brooks.)

God's sake, don't ever owe Paramount any money because they will put the damper on you," or words to that effect, indicating that Paramount was going to get me next, and, the fact of the matter is, Mr. Duncan took a 5-cent piece that he asked me for and I gave it to him, and he placed an additional 5-cent piece with it and at least five times that evening he would point to this 10 cents and give me about six months, and he would bet a drink of beer with me that I would [286] be out of Paramount.

Q. Did they say what they were going to do?

A. They told me they were going to take a vacation. Mr. Brewer told me he was going to take a vacation for six weeks and then didn't know what he was going to do. He said he had had a number of offers, one particularly from the Ardee Maintenance Company, and he would probably accept one of them.

Q. What is the Ardee Maintenance Company engaged in?

A. Competitive pest exterminating.

Q. Pest control? A. Yes.

Q. Was anything else said by them that evenings?

A. Well, nothing whatever—it was just sort of a program to try to win me over to their way of doing, that they had really been harmed by Paramount Pest Control—

Mr. Bernard: I believe, your Honor, that this witness should be required to state what was said and not to draw conclusions.

(Testimony of DeGrey S. Brooks.)

The Court: Go ahead, and tell your story.

Q. (By Mr. Rankin): Did Mrs. Brewer take any part in the conversation?

A. Well, a number of times she spoke up and laughed and said, "Don't ever get in debt to the Paramount people," and about after an hour and a half I got tired of it and told them the best thing to do is to leave good friends, which I did, [287] but Mrs. Brewer said a number of times, "No use trying to get Mr. Brooks to see our side of it. He is a Paramount man." That was said a number of times there during the evening.

Q. What did Mr. Duncan say, if anything, about their severance?

A. Nothing much outside of trying to collect 10 cents for his beer.

Q. Did they say when they were going into business?

A. He told me he was not going into business.

Q. Who told you that? A. Mr. Brewer.

Q. Did Mr. Duncan say whether or not he was going into business?

A. No, Duncan told me he didn't know what he was going to do, that he was going to take a couple of weeks' vacation and go down to the wedding of an aunt or somebody in the south, and when he came back up here he would then make a decision.

Q. Did Mrs. Brewer have anything to say about what her future would be? A. No, sir.

(Testimony of DeGrey S. Brooks.)

Q. Did you talk with them again after this occasion?

A. I only saw Mr. Brewer once, and he came up to my office looking for Mr. Hilts.

Q. Did he discuss at that time anything about leaving Paramount? A. No, sir. [288]

Q. Have you told the Court, Mr. Brooks, every reason that they gave for leaving Paramount?

A. Well, they just simply said that they had had an injustice done to them, they were busy spending their money, they had put thousands of dollars into Paramount and had gotten very little remuneration from it and they just had enough of it.

Q. Did they say anything about taking the help away from Paramount to you?

A. No, sir, they didn't.

Q. When did you start in? Did you start in subsequently to this on the work of trying to overcome the cancellations?

A. I arrived here the 11th of August and from then on I started working on cancellations.

Q. That was the 11th of August, 1947?

A. That is right.

Q. What did you do in an endeavor to stop cancellations?

A. Well, we called on them as fast as they would come in. If it was a letter or if it was a phone call, the boys had to turn in reports on their service calls on cancellations of this kind and

(Testimony of DeGrey S. Brooks.)

I tried, as soon as possible, to contact all of them and find out their reasons for canceling.

Q. Why would you do it?

A. A general custom with Paramount Pest Control, if you lose an account. We want to know whether it is the serviceman's fault or whether the service has been bad. We want to [289] know whether the customer is satisfied or not.

Q. How long did you work on the matter of overcoming these cancellations?

A. I am still working on them.

Q. Have you been in the employ of Paramount Pest Control Service here ever since?

A. Yes, sir, with the exception of just occasionally running over to Spokane.

Q. Is that continuous employment here?

A. Yes, sir.

Q. Can you state, as a summary of these accounts that you have contacted, what the reason is for their cancellations?

A. The general reason has been very much the same in all cases, those that I have contacted personally. It seems as if the men who were servicing them were doing a good job, and these same men would still come, and the only part that was a little unethical was the fact that these same men, in many instances, would go in and service the account and walkout, have a slip signed, and the customer didn't know that it was not Paramount. There was no mention made of the fact that this was Brewer's Pest Control. The service was ren-

(Testimony of DeGrey S. Brooks.)

dered by the same man who had been coming there, and when they came in again to do the service, why, then he went ahead and did his work and had a slip signed. If the customer did not know that there had been a change in name, they could have gone on [290] and on and on.

Q. Did you make any general inquiry as to what, if any, representations were made?

A. Yes, there were many representations made.

Q. What were those?

A. You want me to name the customers?

Q. I don't think that is necessary now. As a general summary, give what those representations were that caused the cancellations, if any?

A. The fact that some of the servicemen, in some instances, would go in and say the company was dissolving.

Q. What do you mean by "company"?

A. That we are not going to continue in business; we are discontinuing business up here.

Q. What do you mean by "company"?

A. The Paramount Pest Control Service.

Q. That the Paramount Pest Control Service was dissolving?

A. Yes. In other cases he would go in there and service the account; if it was the same man, they never thought about it.

Q. Anything else you can think of that your investigation showed as to the reasons for cancelling Paramount contracts?

(Testimony of DeGrey S. Brooks.)

A. No, other than that the same personnel was serving these accounts and that Mr. Brewer or his representatives would walk in and say they were taking the account over on such and such [291] a date, and it would be known as Brewer's Pest Control Service.

In one case, particularly, they told the man that they were taking over, and that we were discontinuing business, that Paramount Pest Control Service was not a company, it was a trade name, they were changing their forms to Brewer's Pest and, instead of paying a royalty on this trade name, Control, and in each case they gave the man a discount on the regular cost of his services to prove that they were saving him a little money.

Q. As manager in charge of this office, Mr. Brooks, did you have any cancellations that called for any repayment of money? A. Yes, sir.

Q. Describe those, please?

A. We had a number—In fact, we have got several thousand dollars on the books of moneys still due on accounts that are unpaid, if that is what you mean.

Q. Did they write in and say, "We have had your service and we don't owe you this money"?

A. Oh, yes.

Q. Did you have any cases where there was a repayment by you to the customer? Did you have any cases where there was a repayment by you to the customer who had already paid for the service?

(Testimony of DeGrey S. Brooks.)

A. Not repayment. We gave him credit for service, and rendered service for which we got no bonus. [292]

Q. Why not?

A. Why—Well, it had been paid in advance; they had paid up several months, those where they had paid several months in advance; that happens lots of times.

Q. Had nothing to do with Brewer?

A. No, had nothing to do with Brewer.

Q. Did you have any cases where you had to remit to them because Brewer had done the service and you had not done it and you remitted any part that had been paid?

A. No. I have not refunded any money.

Q. As manager of the office, did you find all the records there when you come to the office to start work there?

A. I found records but I wouldn't say that the records were complete.

Q. Why not?

A. Well, for our service routings, the cards the men turned in as to where to go on certain dates, and so on, they were many of them blank. There was the name of the customer on there but there was no way of determining whether they had had service or not. In other cases, the cards were dated up in September and October—you could not get any detail from them, and we had to go to the ledger and look them up and work our routings over from the ledger.

(Testimony of DeGrey S. Brooks.)

Q. Did you find any substitutions in your records, where the original records are gone and something substituted for them? [293]

A. Just had cards with the names on but didn't have any detail whether they were accounts or anything. I wouldn't say whether it was substituted or what happened. That was the way Mr. Brewer had run the office.

Mr. Rankin: You may cross-examine.

Cross-Examination

By Mr. Bernard:

Q. As I understand it, you talked with Mr. and Mrs. Brewer on the evening of August 2nd?

A. I believe so.

Q. And you want the Court to understand that he did not tell you at that time that he was in the pest control business?

A. No, sir, he didn't.

Q. Did you see Mr. Wendy Fisher about that time? A. I did, sir.

Q. Did Mr. Fisher ever tell you he had told him on July 30th that he was going into the pest control business?

A. Mr. Fisher didn't tell me that until after I had seen Mr. Brewer.

Q. There seemed to be quite a lot of feeling that night on the part of Mr. and Mrs. Brewer?

A. That is right, sir.

(Testimony of DeGrey S. Brooks.)

Q. They said they had been treated badly by Paramount Pest Control Service; in other words, in your own words, I believe you said the net result was that they said an injustice had [294] been done them.

A. Yes, sir.

Q. And Mr. Brewer, particularly, was quite worked up over the proposition?

A. Yes, sir.

Q. You have testified that a certain unnamed man told you that somebody told them that the reason Brewer was taking over was because Paramount was dissolving. Will you give us the name of this customer or former customer of Paramount who told you that?

A. The Sugar Bowl in The Dalles.

Q. Who up there told you that?

A. The manager and owner of the Sugar Bowl.

Q. What is his name?

A. I don't know what his name is. I would have to look it up.

Q. Who else told you that?

A. I think that is sufficient.

Q. You mean that is sufficient, or is that the only one?

A. That is a case that can be tested, taken up and the man will verify it.

Q. I am asking you to give us the names of any other former customers who ever made that statement to you?

A. I will say that is the only one that made that particular statement.

(Testimony of DeGrey S. Brooks.)

Q. Is that the one who made the statement also that Paramount [295] was really just a trade name here, just using the trade name "Paramount"?

A. That is correct, sir.

Q. Separate and apart from those, you told the Court that several customers or former customers had told you Paramount was dissolving. Will you give us the names of any customers or former customers, or customer, who told you that anybody connected with Brewer said Paramount was dissolving?

A. Peasley Transfer Company, Mr. Davidson, Boise, Idaho.

Q. Where in Idaho?

A. Boise, Idaho.

Q. Who else?

A. The manager of The Dalles Hotel in The Dalles.

Q. Who was it? Do you know his name?

A. I don't know his name.

Q. Who else?

A. I think that is all I can recall right offhand.

Q. Did anybody in Portland tell you that?

A. I didn't really do much in Portland. Mr. Fisher was working Portland and I was working out in the country on the Eastern run when I first came up to this job.

Q. Did you talk to Mr. Flanagan of Albers Milling Company?

A. No, sir, I didn't.

Q. Whose deposition was taken the other day?

A. No, sir, I don't remember him now. [296]

(Testimony of DeGrey S. Brooks.)

Q. You spoke about the index cards. You said that some of these cards or as to some of these cards the dates did not appear; it did not appear on what date the customer was supposed to be serviced, is that it? A. That is right, sir.

Q. You do not want the Court to understand that there were some of the records of Paramount Pest Control Service that had been taken out of that office? A. They were not in the office.

Q. What records?

A. We had an index file in which we have a 5 by 7 card that is marked up by months, January, February, March and so forth, and every time a serviceman does a job he comes in and makes his report on his service card. The office girl will take that and post that on the index card so that when the man makes his rounds again he knows the last time he has been there or when it has been serviced, in order to keep our service uniform.

Q. Anyway, some of these cards at that time did not happen to show the date?

A. That is right, sir.

Q. You did not find any cards of any customers missing, did you?

A. Well, I wouldn't say, no. I can't remember no names.

Q. You said some of these cards had been dated up to September [297] and October. What did you mean by that?

A. There would be many cards with the name on it, the service contracts that we had on our books.

(Testimony of DeGrey S. Brooks.)

and the date of the last call would be September or October, which was two months prior to the time——

Q. You could understand by looking at it that those calls had not been made, of course?

A. I didn't know whether they were made this year or last year.

Mr. Bernard: I think that is all.

Redirect Examination

By Mr. Rankin:

Q. I should have asked you one other question. Referring to Exhibits 54 and 55, you have seen these before?

A. Yes. I don't know which ones you are referring to, though.

Q. Exhibits 54 and 55. A. 54 and 55?

Q. Who compiled these lists, do you know?

A. These lists are compiled in our office by the bookkeeper.

Q. Under whose direction?

A. Under my direction and also I would say Mr. Walt Moore who had something to do with them.

Q. Did Mr. Hilts have anything to do with them?

A. Sir?

Q. Mr. Hilts. There are letters in there marked "DeGrey [298] Brooks." Can you identify those as copies of the originals that you originally signed?

A. Yes, sir. Those are letters acknowledging cancellations of contracts.

(Testimony of DeGrey S. Brooks.)

Q. Generally speaking, wherever that name or initials appear, they are letters written by you, is that correct? A. That is right, sir.

Mr. Rankin: That is all.

Recross-Examination

By Mr. Bernard:

Q. Can you give me the name of the man who was supposed to have made these representations to the Sugar Bowl, the Peasley Transfer Company or The Dalles Hotel?

A. The names of the parties themselves?

Q. Yes.

A. They were the owners or the managers of these particular places. I don't know them personally by name.

Q. Did they give you the name of the person connected with Brewer? A. Never did.

Q. The name of the person connected with Brewer who made this statement?

A. No, sir, they didn't say which man it was. In one instance I believe Ray Rightmire's name was signed to a slip, a service slip, and that was in The Dalles, I believe. [299]

Mr. Bernard: That is all.

(Witness excused.)

HAROLD W. HILTS

having been previously duly sworn, was recalled as a witness on behalf of plaintiff and was examined and testified as follows:

Direct Examination

By Mr. Rankin:

Q. Mr. Hilts, you testified the other day to some eleven agencies of the Paramount Pest Control Service. Can you describe more in detail those agencies? You had not completed your statement about them.

A. Yes, sir. There are agents that we have operating under franchises——

Q. The franchises that you described, do they bear any resemblance to the franchise which was had by Mr. Brewer and dated July 1st, 1946?

A. Yes, sir, with the exception of the name of the manager or the man that it was franchised to, and the boundary lines, they are practically absolutely identical.

Q. How many franchises of that identical nature are in existence? A. Eight.

Q. Are there any franchise managers who have ever gone broke? [300] A. No, sir.

Q. Have any of them ever made any money?

A. Very definitely so.

Q. Can you give the Court a general idea of the maximum return that has been made under a franchise and the minimum return made under a franchise in your business?

(Testimony of Harold W. Hilts.)

A. The maximum amount of money that has ever been made by any one of our franchise operators, in round figures—I don't remember exactly, but it will run from \$22,000 to \$24,000 annually, a year.

Q. And the minimum?

A. The minimum amount of any one of our operators is upwards of \$6,000.

Q. Have any of those ever resigned or left you?

A. Not at all, sir.

Q. Never once?

A. Not of the eight. We had a resignation of a manager of ours who was operating in Sacramento who made \$14,000 in 1945, and he decided he wanted to become a missionary, so he resigned and left the organization.

Q. He was not broke when he left?

A. Not by a long shot.

Q. What kind of a contract was he under?

A. A franchise contract, the same as Mr. Brewer had.

Q. Mr. Brewer came up under a different kind of an agreement, [301] when he came here. What do you call it?

A. It was a franchise manager's contract.

Q. How many of those do you have in existence?

A. Now?

Q. Yes. A. Three.

Q. Have any of the franchise managers ever gone broke? A. No, sir.

(Testimony of Harold W. Hilts.)

Q. Have they made money?

A. Yes, sir, they have. They have made more than wages.

Q. Have you had any of those cancel out or leave the service?

A. Oh, occasionally one does.

Q. With particular reference to Mr. Osborn, did you inspect his books? A. Yes.

Q. Did you make an audit from them?

A. Yes, sir, I did.

Q. He has returned to Seattle?

A. Yes, he has.

Q. Do you know whether or not he is making money? A. Why, certainly he is.

Q. Was he ever broke as Mr. Brewer indicated the other day?

A. Not to my knowledge. I have never seen him broke.

Q. Have you continuously inspected his books?

A. His books have never indicated he was broke.

Q. Now, on the matter of damages, state whether or not you have prepared any statement that would indicate the obligations of Mr. Brewer to Paramount? A. Yes, we have.

Q. Page 14, Paragraph 6, subparagraph (1)(a) of the complaint alleges that there is a balance due Paramount from Mr. Brewer as of June 30, 1947, in the sum of \$3,100. Have you an exhibit that shows that obligation? A. Yes, there is.

Q. There is produced for your inspection Exhibit 36. A. Now, I have it.

(Testimony of Harold W. Hilts.)

Q. What is the total obligation shown by that?

A. \$3,359.61.

Q. Was there any payment on that?

A. Yes, there was a payment of \$259.61 on July 9, 1947.

Q. That is the payment you have previously described? A. Yes.

Q. That left a balance of what?

A. \$3,100.

Q. Has that ever been paid? A. No, sir.

Q. Paragraph 6, subparagraph (1)(b) of the complaint is an allegation of a balance due under the franchise for July, 1947. Did you prepare any exhibit to disclose that?

A. Yes, sir, I did. [303]

Q. What is that exhibit? You might look at Exhibit 39. A. 39?

Q. Yes.

A. It must be out of order. I can't seem to locate it.

Q. Here it is, right here. A. Thank you.

Q. What does that show?

A. Shows the total amount due, \$478.15, based on the franchise contract for July, 1947.

Q. For what month? A. July.

Q. For the month of July, 1947? A. Yes.

Q. Where did you get that figure?

A. From the books.

Q. Whose books?

A. From Mr. Brewer's books, the books in the Portland office.

(Testimony of Harold W. Hilts.)

Q. Has that amount been paid?

A. No, sir.

Q. There is a claim here, one for difference between the investment, and the other for fixed assets not turned in as per contract. Are those on the same basis? What about those claims? Look at Exhibits 50 and 51 and explain it to the Court, please.

A. Exhibit 50 is the total amount of assets on the records, less depreciation. The depreciation is figured on the accounting rules [304] set forth by the Federal Government. 51——

Q. 51. I am in error. I have not reached that yet. Explain these two claims, for \$259.63 and \$973.30, as to whether or not they are obligations of Brewer and, if so, how?

A. \$259.63 and \$973.30 interwind with each other. The \$973.30 represents the equipment that was not turned in by Brewer as per his contract.

Q. Have you any exhibit on that?

A. Yes, sir.

Q. What is the exhibit number? Is it 50?

A. Yes, it is. It is the next half of 50.

Q. Have you anything further to state in regard to that?

A. It shows on the exhibit, the second half of Exhibit 50, that there was a 1936 Plymouth car, a "Hi-Fog" exterminator and service unit, a spray rig and a two-wheel trailer, also the additional cost of trailer and one Dobbins pump, single-phase, that

(Testimony of Harold W. Hiltz.)

are all recapped in the figure \$973.30. That is, of course, the book value which means the depreciation is figured and figured in as expenses.

Q. The fifth item on page 15 of the complaint, Paragraph 6(e), refers to an expense account of certain items. You say those items amount to what? A. \$925.89.

Q. Have you an exhibit to disclose that?

A. Yes, it is on Exhibit 51. [305]

Q. Explain why that is a charge here.

A. The reason for this being a charge is because they are unsupported expenditures. In other words, checks were drawn, as the exhibit indicates, the check number and the date on which drawn and to whom they were paid, but with no supporting evidence of the expenditure. Therefore, according to accounting procedure, when there is no supporting evidence, they have to be charged. If there is no supporting evidence, it is charged to the owner of the business as his drawing account, under accounting practice.

Q. The next item on page 15 of the complaint, Paragraph 6(1)(f), evidently relates to the Eastern Oregon run. You have testified about this Eastern Oregon expense and the agreement?

A. Yes.

Q. Does this relate to expenditures incurred in the performance of that agreement?

A. Not expenditures, but the income.

(Testimony of Harold W. Hilts.)

Q. Describe it then, in detail.

A. This one, amounting to \$678.50, is one-half of the income that was derived from the Eastern Oregon run as per Mr. Brewer's understanding of a split of the income and expense of that venture, putting on new business. The expense item is shown under the June 30th settlement of \$3,100 and the income we had never received which we were entitled to, and therefore it is in this item.

Q. What exhibit discloses this obligation?

A. Exhibit 51.

Q. Exhibit 51-A, does that have any bearing on it? Does Exhibit 40 or 40-A?

A. 40 and 40-A do not. I will see what 51-A shows. Yes, 51-A indicates the amount of revenue derived from the Eastern Oregon run for the months of February, March and April, giving the number of accounts handled and also the total volume for those months.

Q. (By Mr. Bernard): 51-A?

A. Yes, 51-A.

Q. (By Mr. Rankin): No. 51, does that have any bearing on it?

A. No, sir, 51 is the \$925.89 unsupported.

Q. 51-A is the only exhibits which sets out in detail this Eastern Oregon operation?

A. Correct.

Q. Page 16, Paragraph 6(2)(a), does that explain that? A. Which one is that?

(Testimony of Harold W. Hilts.)

Q. Paragraph 6(2)(a), which reads, “ * * * plaintiff sent men into said territory to interview and hold such accounts as plaintiff could and the action of said defendants, as herein described, damaged plaintiff in the amount of said expense, consisting of \$3,596.95.”

Please explain that, will you?

A. Well, when we found out what had actually happened to us, [307] what had really been done, we had to protect our business, naturally, as any business organization would.

Therefore, we had to import people into the area, experienced men and people familiar with the business, to carry on, and also determine just exactly where we did stand, as far as our accounts were concerned.

We are a service organization. We do not sell a commodity. Therefore, our business is erected around our personnel, and whenever we realize in our business that our personnel is *in way* not right in relation to the customers, then we try to determine what the situation is and, therefore, under the situation that we ran into here in Portland, we were naturally anxious to find out just as soon as possible from all of our customers just where we stood, which has been borne out in earlier testimony. This is the amount involved in bringing people that were necessary here to find this out and to protect our accounts and our business.

Q. Have you made an exhibit for that?

A. Yes.

(Testimony of Harold W. Hilts.)

Q. Have you detailed in that exhibit what the expenditures were for? A. I believe so.

Q. Look at Exhibit 53 and see if it covers every item that you have mentioned covering expenses in an effort to hold the business? [308]

A. Yes, it indicates my time and that of Andy LePape, Carl Dolby, W. T. Moore, DeGrey Brooks, whom we brought from Spokane, and Mr. Fisher who happened to be here and of course went right on our payroll, and Mr. Elfers whom we brought from Seattle, Mr. Sibert and Mr. G. H. Fisher.

Q. Is that total set forth in Exhibit 53?

A. Yes. The total is set forth. It is set forth in detail, in fact. It indicates the expenses for hotels and meals and automobile expenses necessary to carry on.

Q. How much does that amount to?

A. A total of \$3,596.95.

Q. The next item on page 16, Paragraph 6(2) (b), having to do with contracts having a balance of the year to run. There are in evidence here lists contained in Exhibits 54 and 55 of the contracts that were canceled. Some of these contracts that they had some time to run.

The Court: Recess until 1:30.

(Thereupon the Court was recessed until 1:30 o'clock p.m.) [309]

(Testimony of Harold W. Hiltz.)

Court Reconvened at 1:30 o'Clock P.M.

January 23, 1948

Direct Examination

(Continued)

By Mr. Rankin:

Q. Have you the list of accounts?

A. Yes.

Q. You spoke to me during the noon hour of something you wanted to make clear. What was that?

A. I wanted to be clearly understood—I don't think I have made it quite clear—relative to Item 3 of damages. Item No. 3 is contained in Item 4.

Q. So, in place of \$259.63 and \$973.30 there is just the item of \$973.30? A. That is right.

Q. When we recessed at noon we were about to discuss Paragraph 6(2)(b), on page 16 of the complaint, relating to contracts having a balance of one year to run. Have you Exhibit No. 54?

A. Yes, sir.

Q. Who compiled Exhibit 54? A. I did.

Q. What does it show as to total?

A. Shows a total of \$4,596.75.

Q. That is \$4,596.75? A. Yes. [310]

Q. What is that figure?

A. That figure represents contracts that were still in effect and had time to run, after Mr. Brewer's action, and which we lost.

Q. How long did they have to run?

(Testimony of Harold W. Hilts.)

A. Various times. They are enumerated there, the account number, the date of the contract, the amount of the monthly charge, and the balance of the term of the contract, also the balance of the amount of revenue that would have been involved in it.

Q. State whether or not this \$4,596.75 represents the face of the contracts? A. Yes, it does.

Q. Does it represent the amount of profit that Paramount Pest Control Service would have received? A. No, sir.

Q. Can you figure the amount of the profit that Paramount Pest Control Service would have received under those contracts that were canceled within the year?

A. Yes. According to our experience rating and the way our business is set up to operate, we could expect 40 per cent profit on the face of these contracts.

Q. How much does it take to process or serve these contracts? A. 60 per cent.

Q. Is that the accepted standard in your business, or is that [311] something exceptional that you are applying to this case?

A. Not a bit exceptional. It is more or less standard. Sometimes it varies a few points one way or the other.

Q. That is, the total amount, \$4,596.75 represents the face; so far as profit is concerned, it would be 40 per cent of that that would be returned to Paramount? A. Yes, sir.

(Testimony of Harold W. Hiltz.)

Q. How many contracts is that figure based on?

A. I have not counted these contracts. I can say that this item, \$4,597.75, and the next item, \$566.50, represent a total of 185 accounts.

Q. How many of those contracts are admitted by Mr. Brewer in his answer to have been taken over by him? A. 141.

Q. What are those additional contracts in that \$4,596.75 item that are not admitted by him?

A. Well, there is quite a number of them—44, to be exact, such as Schuster Brothers.

Q. You need not go through an enumeration of the 44. You have testified the cost of those is 60 per cent. Can you break down that 60 per cent any further? A. Yes.

Q. How?

A. Figure in 60 per cent an average of 38 per cent being for servicing the contracts and 22 per cent being for the overhead [312] operation of the business.

Q. Give a general statement, not too much in detail, as to what is included in overhead.

A. Well, in overhead there is the office girl, advertising, telephone and telegraph, insurance, taxes and licenses, depreciation and quite a number of other items——

Q. That is sufficient.

A. If you will let me refer to the exhibit, I can enumerate them all.

(Testimony of Harold W. Hilts.)

Q. They will inquire further if they wish. Does that overhead continue in spite of cancellation of contracts?

A. Yes, sir.

Q. Who paid the overhead?

A. Well, during Mr. Brewer's contract Mr. Brewer paid for it. During our contract, we paid for it—After Mr. Brewer left us, we had to pay for it.

Q. What do you include in the 38 per cent service?

A. There is wages for servicemen, materials and chemicals to be used on the job, traveling expenses, such as hotels, rooms and meals.

Q. As to these contracts, you say after his severance you paid the overhead. How about the service? Did you service these contracts afterwards?

A. No, sir, but we had to have personnel servicing these contracts. [313]

Q. Who took the servicing of the contracts over?

A. We did. We had our organization here.

Q. Yes, but who actually serviced them?

A. Mr. Brewer was servicing the contracts.

Q. Then, in that \$4,500 item, or practically \$4,600 item of damage, all that you were relieved of was the service or 38 per cent?

A. That is correct.

Q. Take the next item on page 16, paragraph (c), contracts exceeding one year to continue on a per-month basis. Pardon me just a moment. Strike that.

(Testimony of Harold W. Hilt.)

That \$4,596.75 item broken down to 38 per cent of that is contained in what exhibit?

A. It is contained in Exhibit 54.

Q. Now, take the next item, contracts exceeding one year to continue thereafter until completed, under the terms of the contract on a month-to-month basis. How many of those did you find that had not expired?

A. How many contracts?

Q. The amount of them is more important.

A. \$566.50. That is just the monthly service involved in those contracts.

Q. Is that set forth in any exhibit?

A. Yes, sir, it is Exhibit No. 55.

Q. Over and above these items, can you advise the Court whether [314] or not the business in general suffered a damage? A. Yes, sir.

Q. What kind of damage, and can you give an estimate of how much?

A. Well, we suffered a damage of approximately \$1,500 per month, in round figures. We feel that, according to our experience rating, over a period of years' operation, that the accounts which stay on the books over a period of years run 60 per cent, that the customers we retain is 60 per cent. Therefore, on the basis of 60 per cent of \$1,500 would be about \$900 and, taking into consideration the balance of the term of the contract, which would have been eight years and eleven months, we have suffered a damage I feel of \$96,300.

(Testimony of Harold W. Hilts.)

Q. That is over the entire period of time?

A. Yes, sir.

Q. There is a claim by Mr. Brewer of some \$700 and another of some \$1,350. Did you take credit on those into consideration?

A. Yes. That totals about \$2,050, and we have allowed for that.

Q. How?

A. Well, there was the amount of money that Mr. Brewer received and had taken out of the business.

Q. You heard the testimony the other day when he said he had taken out \$1,000 of investment, and how much more? [315]

A. Well, he had taken out approximately, according—According to the records he has taken out over \$4,500.

Q. How much was left in the bank on August 1, 1947, when Mr. Brewer started in for himself, in the account of Paramount Pest Control Service?

A. In accounts receivable?

Q. No, in the bank account.

A. In the bank account?

Q. Yes.

A. Oh, right around \$4.00. There were two bank accounts. One of them was the payroll account and the other was the general account and the total amount left in the bank in these two accounts was around \$4.00.

(Testimony of Harold W. Hilts.)

Q. How much did he draw in July, 1947, do you know?

A. Over \$1,000, \$1,017 and something.

Q. Some time at the beginning of this trial, Mr. Sibert mentioned Mr. Brewer's visit to his home when he purchased airplane tickets for Mr. Brewer, and Mr. Brewer says he purchased those himself.

Will you, very quickly, give a statement as to whether you looked that matter up and what you found?

A. Yes, I checked the checks which Mr. Brewer claims in his testimony had been drawn for these airplane tickets. There are three checks. In fact, one of them was to pay for a tire and the other one was for \$50, and the other one was for \$100. [316] The one for \$100 was drawn the day after Mr. Brewer had left Portland for Oakland.

Q. Are these the three checks mentioned by Mr. Brewer?

A. Yes. They are numbered 398, 399 and 400.

Q. Did you look up the record as to the airplane tickets that were purchased?

A. Yes, sir. They were purchased by Mr. Sibert from his personal credit, and I happened to be present when he was doing so.

Q. Were they billed to Mr. Sibert?

A. They were billed to Paramount Pest Control Service. This credit is in the name of Mr. Sibert of Paramount Pest Control Service.

(Testimony of Harold W. Hilts.)

Q. The Paramount Pest Control Service paid for them, according to the record?

A. Yes, sir, they did.

Mr. Rankin: You may cross-examine. I do not believe it is necessary to introduce these records. They are available if counsel cares to see them.

Mr. Bernard: May I have Exhibit 36?

Cross-Examination

By Mr. Bernard:

Q. Can you tell me, in round figures, the gross amount of business done by the Portland—I will call it the Portland branch office—in the thirteen months Mr. Brewer was here? [317]

A. Not without looking at the records. I believe it would run upward of \$35,000.

Q. Mr. Brewer stated it would run, in round figures, \$35,000. Do you think that is substantially correct?

A. I think it is pretty close.

Q. You were here how often during those thirteen months? I will say, prior to July 1, 1947?

A. Well, I was here in May, in April and March, in January, December, November and October and again in May of 1946 and April of '46. I brought Mr. Brewer up here around the 1st of April, 1946.

Q. Mr. Brewer has testified nobody connected with the company ever made any complaint with the way he was handling the business. Did you ever make any complaint to him about the way the business was being conducted?

(Testimony of Harold W. Hilts.)

A. I did not complain to him. I tried to show him on various occasions how it could be operated more profitably.

Q. In what way?

A. It is not my policy to complain.

Q. What suggestions, generally, did you make to him?

A. Well, in the line of expenses and in the way of help and taking the men in and seeing that they got started correctly so that it is inexpensive.

Q. Did you think he had to have help or use help in the Oregon district? [318]

A. Yes, at various times he did.

Q. How many men do you think he should have had?

A. It would depend on the volume of business and that changed from month to month.

Q. What was the greatest number of help Mr. Brewer had at one time?

A. I really don't know, offhand.

Q. His territory took in all of Oregon?

A. That is correct.

Q. You said Mr. Brewer drew around \$4,500 during the year. How was that made up, Mr. Hilts?

A. Well, he drew over \$2,500 the last seven months of 1947; he drew \$1,000 the last six months of 1946.

Q. He drew what?

A. There may be a correction. I might have said the last part. I meant the first seven months

(Testimony of Harold W. Hilts.)

of 1947 he drew over \$2,500; the last six months of 1946 he drew over \$1,000, and that is shown on the record of drawings.

Then there was an additional amount of \$925 of unsupported expenses that we considered was a drawing.

Q. On Exhibit 36 it shows "Brewer drawing, \$2505.55." What period of time does that represent?

A. From January 1st, 1947, to June 30, 1947.

Q. That just covers the period of six months?

A. That is correct. No, I beg your pardon. I am wrong there. [319] It covers the period of from July 1st, 1946, to June 30th, 1947. I would like to have that exhibit to refresh my memory. I can't remember figures too well.

Q. This exhibit purports to cover a year instead of six months?

A. That is correct.

Q. It says here "Plus Brewer drawing, \$2505.55." What does that figure represent?

A. That figure represents his drawings record on the books from July 1, 1946, to June 30, 1947.

Q. One year?

A. That is correct.

Q. You say, then, he drew in July, 1947, how much?

A. Over \$1,000.

Q. The only other item which you add to that is this \$925 which you say is unsupported by vouchers?

A. That is right.

Q. Was he repaid the \$1,000 that he put in at the start?

A. He was repaid in the \$4,500.

(Testimony of Harold W. Hilts.)

Q. Well, did he withdraw any \$1,000 in addition to this \$2,505.55 and \$1,000 in July?

A. I don't know.

Q. The point I am making is: If he was repaid the \$1,000, it has to be deducted from the amount of these drawings that you have shown here.

A. That is right. [320]

Q. If we deduct the \$1,000 from the amount he withdrew in July, the total amount Mr. Brewer drew during the life of the contract would be \$2,505.55, plus any balance over and above \$1,000 in July, 1947, and any portion of this \$925 which is properly charged against him?

A. Yes, and we only got \$994.

Q. What do you mean by that?

A. That is all we ever got out of it.

Q. Well, where did you get that?

A. That was the amount of the January and February, 1947, franchise, total \$994.25.

Q. How much money have you—When I say “you” I mean the Paramount Pest Control Service—collected on contracts since August 1, 1947; I mean contracts that existed prior to that time on work done by Mr. Brewer?

A. Less than \$1,500.

Q. Can you give us the exact figure?

A. No, I can't exactly. That is right around under \$1,500. I don't know exactly the figure.

Q. About \$1,500? A. That is right.

Q. There was paid to you how much, by Mr. Brewer? A. I didn't understand.

(Testimony of Harold W. Hilts.)

Q. There was paid how much by Mr. Brewer?
You say \$900-odd? A. \$944.25. [321]

Q. So you have received \$994.25 plus about \$1,500?
A. That is right.

Q. That is correct?

A. There was also another payment made on the settlement of \$259.61. I didn't take that into consideration when I answered you.

Q. Anyway, you have received, in addition to the amount set forth here that he was given credit for, you have received approximately \$1,500 in addition to that?

A. I don't get your question. I am sorry.

Q. There are certain payments that it is conceded in the pleading and by everybody that Mr. Brewer made. In addition to those, Paramount Pest Control Service has received about \$1,500 in collections since this trouble started?

A. In round figures, I think.

Q. On Exhibit 36— and any time you want this let me know and I will hand it up to you—

A. Yes.

Q. —is an item "Bills due Oakland as of date, \$533.65." There is a circle with a cross in it after that figure. Do you remember who put that in?

A. Yes. I put that in.

Q. For what purpose?

A. Those are bills that Mr. Brewer acknowledged that he owed Oakland. [322]

Q. I mean this mark.

A. That circled asterisk?

(Testimony of Harold W. Hilts.)

Q. Yes.

A. We have the same thing down below.

Q. What was the purpose of writing that in?

A. To tie it in to a number of invoices.

Q. Didn't Mr. Brewer tell you at the time he had some question about that amount?

A. No, not at all. He conceded it.

Q. He conceded this amount entirely?

A. Absolutely. He conceded the whole thing and made a payment on it.

Q. Exhibit 39 is an exhibit showing an account as of July, 1947. You have "Monthly control service, \$2,585.05." Is that the total amount of the charges for monthly service whether or not the collections had been made?

A. I don't know unless I can refer to the exhibit.

(Exhibit No. 39 shown to the witness.)

A. Now, your question again, please?

Q. (By Mr. Bernard): You have a total amount of business done, whatever the figure is, the first three items. What do they total up to?

A. \$2,645.55.

Q. Is that the total amount of business done or the total amount of money collected? [323]

A. That is the total amount of business on the books.

Q. In arriving at the amount due Paramount Pest Control Service, you have taken 20 per cent of that amount?

A. No.

(Testimony of Harold W. Hilts.)

Q. Less one or two credits?

A. Less allowances that were written off the books during the month of July of \$254.80. We claimed 20 per cent of the balance, \$2,390.75, which is \$478.15.

Regardless of whether or not the money had been actually collected?

A. That is correct. These are franchise routes.

Q. I know they are franchise routes, but if you will answer the question, please.

A. You bet I will.

Q. Maybe you will remember this exhibit. Exhibit 51 is the list of the expenditures not verified, totaling \$925.89. As I understand, you have charged those to Brewer in addition to the other drawings because you could not find any supporting vouchers, is that correct?

A. Yes, sir.

Q. You, yourself, of course, have no way to know whether or not that money was spent as legitimate expenses in connection with the business or whether he spent it on himself?

A. The only way we can determine, if there is expense in the record for it, is that he made out expense accounts for other [324] items he has paid and charged it to expenses. If there was no supporting evidence, the only thing we can do is come to that conclusion.

Q. I didn't ask you that. I said you, yourself, have no personal knowledge as to where any of this money went, have you?

A. No.

(Testimony of Harold W. Hilts.)

Q. Is that correct? A. No, it is not.

Q. What? A. I don't know.

Q. Now, I refer to Exhibit 53 in which you list the expenses of the business as \$3,596.95. What is your salary with the company?

A. I didn't understand.

Q. What is your salary with the company?

A. \$5,200 a year.

Q. On this exhibit you have "R. W. Hilts, Time, \$350." Was that in addition to your salary or merely a proportion of the time with reference to the salary which is put in here?

A. It represents the time that I put in here.

Q. The company did not pay you any additional salary? The company did not pay you any additional salary, did they, by reason of your coming up to Portland?

A. Not in this particular case, no. [325]

Q. Who is Andy LePape?

A. One of our men.

Q. What is his salary?

A. I don't remember exactly. The computations are there.

Q. It says \$250 here.

A. That is what it is then.

Q. That is his salary with the company, at that time? A. Yes.

Q. Was he paid any additional salary by reason of coming up to Portland? A. No, sir.

Q. Carl Dolby. Who is Carl Dolby?

A. One of our men.

(Testimony of Harold W. Hilts.)

Q. It says here \$253.84. Was he paid any additional money by reason of coming to Portland?

A. No, sir.

Q. W. T. Moore, \$103.87. Who is W. T. Moore?

A. One of our men.

Q. Was he paid any additional compensation by reason of coming to Portland? A. No, sir.

Q. DeGrey Brooks, \$207.75. Was he paid a salary? A. Yes, sir.

Q. Was he paid any additional salary by reason of coming to Portland? [326]

A. No, sir.

Q. C. W. Fisher.

A. He was not with the company at the time. He went on the payroll immediately upon arriving.

Q. How long had it been since he had been with the company prior to August 1st?

A. A matter of a few months.

Q. How long did he work? A. A month.

Q. A month?

A. Yes, in and around the territory. He was not here in Portland a month. He was traveling around the country,—around the territory, rather.

Q. Who is Mr. Elfers?

A. Also one of our men.

Q. You have got him down here for \$220. Was he paid any additional salary by reason of coming to Portland?

A. No, sir. We had to pay other expenses, though, to cover all of these men.

(Testimony of Harold W. Hiltz.)

Q. Exhibit 54 in an exhibit which is headed "Canceled accounts with time to run as per contract."

What did you do in making up this exhibit, put in all the contracts that had been canceled since August 1st?

A. Only those contracts that were canceled because of Brewer's action. [327]

Q. How did you determine they were canceled because of Mr. Brewer's action?

A. There is an exhibit attached to that, the contract itself, plus, I believe, supporting detail as to the customers and, in some cases, the reasons, where they were contacted personally by the men and they brought that information back with them in submitting the canceled accounts by the medium of the cancellation slip which is attached, I believe, for both of these exhibits.

Q. How did you determine, in making up this exhibit, that Mr. Brewer was responsible for canceling any particular contract?

A. Any accounts that were canceled at the time, right after the beginning of August 1st, 1947, were put aside specifically for that purpose, and we scheduled them and we knew what they were.

Q. Under this heading "List of accounts that were on books longer than a year and canceled only because of Brewer action," on Exhibit 55, that, as we understand it, is the total amount that the customers would have been called upon to pay if the contracts had run their time, is that correct?

A. That is correct.

(Testimony of Harold W. Hilts.)

Q. And then you said you figured you were entitled to 40 per cent of that?

A. That is correct. [328]

Q. If all that money had been collected by Mr. Brewer after July 1st and the work done by him, how much would Paramount Pest Control Service have received on it?

A. If it had been collected by Mr. Brewer?

Q. No. You have here that there would have been collected, if the contracts had run their course, \$4,596.75. If Mr. Brewer had succeeded in performing these contracts under his license, how much would Paramount Pest Control Service have received?

A. We would have received, under the agreement, 20 per cent should the agreement cease to exist. Therefore, we would have received 40 per cent.

Q. In other words, you are claiming twice as much as you would have received if he had gone on under his license?

A. That is correct, but he did not go on.

Q. As I understand it, you also said you figured you were entitled to \$1,500 a month damages. That would be \$18,000 a year. How do you figure that?

A. I didn't say that.

Q. Tell me what you did say.

A. I said we figured our damages amounted to \$1,500.00 a month, and that we could retain under the terms of the contract, on an experience rating,

(Testimony of Harold W. Hilts.)

60 per cent of all customers that are on our records and, therefore, our damage is about 60 per cent over the term expiration of the contract.

Q. 60 per cent of what? [329]

A. 60 per cent of \$1,500 per month for nine years, for eight years and eleven months.

Mr. Bernard: I think that is all.

Redirect Examination

By Mr. Rankin:

Q. Counsel asked you about \$1,500 that you received as payment on the contracts after August 1st?

A. Yes, sir.

Q. Did you have to service those contracts?

A. Yes, sir.

Q. Exhibit 54 contains a list of contracts canceled. Counsel asked you why you attributed those to Brewer. State whether or not you compared those canceled contracts with the answer that Mr. Brewer filed in regard to the interrogatories?

A. Yes, sir, I did.

Q. And did Mr. Brewer confirm those cancellations by saying that he had taken over the contracts?

A. Yes, sir.

Q. Counsel also inquired of you whether or not these men were paid a regular salary or were paid anything additional. Would any of those men have been doing the work of saving the company's business in Oregon had Mr. Brewer not left the company and canceled the contracts and then continued his service?

(Testimony of Harold W. Hiltz.)

A. No, sir. We would have received revenue from their operations elsewhere in our organization.

Q. Did you give Mr. Brewer an opportunity to explain the vouchers in that item of the exhibit that has to do with the unsupported charges or withdrawals? A. No, not at that time.

Mr. Rankin: All right. Thank you.

Recross-Examination

By Mr. Bernard:

Q. Maybe in one of my questions I did not make myself clear. When Mr. Brewer left on August 1, 1947, there were some amounts owing for work which had already been done by him? I mean, on the books? A. Yes, sir.

Q. How much of that has been collected by Brewer's Pest Control?

A. By Brewer's Pest Control?

Q. By the Paramount Pest Control Service, yourselves? A. Around \$1,500.

Mr. Bernard: That is all.

Redirect Examination

By Mr. Rankin:

Q. Did you service the contracts from which you received that money?

A. We serviced them afterwards, but not before.

Mr. Rankin: All right; that is all.

(Witness excused.) [331]

GLENN H. FISHER

was thereupon produced as a witness on behalf of plaintiff and, being first duly sworn, was examined and testified as follows:

Mr. Rankin: If the Court please, at the time I offered this one deposition of Mr. Flanagan, I anticipated using others along the same line, or I would not have offered the one little deposition. To expedite this case, I think we can dispense with these others, so I place no particular stress upon that one little deposition.

Direct Examination

By Mr. Rankin:

Q. You are a little hard of hearing, aren't you, Mr. Fisher? A. Slightly.

Q. Give your name to the Court.

A. Glenn Harold Fisher.

Q. Where do you live?

A. 6600 Dawes Street, Oakland, California.

Q. About how long have you lived there?

A. About two and one-half years.

Q. What is your occupation?

A. Pest control.

Q. How long have you been in the pest control business? A. Since 1935.

Q. Are you the Glenn Fisher mentioned as one of the partners in the original Paramount Pest Control Service with Mr. Sibert? [332]

A. I am, sir.

(Testimony of Glenn H. Fisher.)

Q. When did you first meet Mr. Brewer?

A. In the early part—I would say in the first week of January, 1946.

Q. What was the occasion of your meeting him?

A. He was in Mr. Sibert's office, talking to him, I think at that time, in regards to being employed by us.

Q. Do you segregate any departments in your corporation for any one individual to supervise?

A. Yes, we do.

Q. Have you a particular department that you give your attention to?

A. Yes. My real function in the organization is contacting our personnel, our managers, throughout the territory.

Q. Did you have anything to do with Mr. Brewer in that regard?

A. No, I didn't.

Q. Did you have, at any later date, any occasion to confer or discuss any phases of the business with Mr. Brewer?

A. What do you mean by a later date?

Q. After this January meeting when you first met him for the first time?

A. Yes. In February, I think it was the forepart of February, that same year.

Q. What was the occasion and what did you do?

A. I was having a conversation or conference with Mr. Sibert [333] and we had decided something would have to be done with the Portland territory, and we discussed at great length the possi-

(Testimony of Glenn H. Fisher.)

bilities and what we should do about it, and about that time we decided that Mr. Brewer, whom I had met about a month previous, would be the man. We were preparing to call him and we got a buzz from the front office that he was out in the front office waiting. It was entirely a coincidence.

Q. Did you discuss the matter with him?

A. I did.

Q. Just tell what transpired.

A. We called him back and talked to him about the territory, and he had previously expressed his desire, if he came to work for us, to come to this general territory, and he wanted to know something of these agreements that we had with our employees, so we told him there were two, a managership agreement and also a franchise agreement, and, in order to better explain them to him, I got a copy of each from our files and we sat down right across the table and we took those paragraphs more or less paragraph by paragraph and, if he had questions to ask, I tried my best to explain it to him.

Q. When was this, please?

A. This was in February, the forepart of February.

Q. What year? A. 1946.

Q. Did you at that time explain to him the franchise agreement, [334] a franchise agreement in the same form as that which he signed on July 1st with you?

(Testimony of Glenn H. Fisher.)

A. Yes. With the exception of the name of the agent, the territory and date, I would say they were verbatim.

Q. Did he come up immediately on that franchise?
A. No, he didn't.

Q. What did he come on?

A. Well, he came on our promise of a managership agreement.

Q. Did he sign a managership agreement?

A. Not at that time.

Q. Did he later sign one?
A. Yes, he did.

Q. When?

A. In Portland, Oregon, after I came up some two or three days later.

Q. At the time he came to Portland, had you gone over both contracts with him?

A. Definitely.

Q. Did he take them to any lawyer or any place that you know of?

A. No, I don't know as he did. I oftentimes suggest that they might, but I don't know as I did this time. Possibly could have.

Q. Did he take that away with him?

A. Yes. [335]

Q. Take them away, I should say.

A. Yes.

Q. What did he do with them, if you know?

A. He took them home. I told him, "Take these home and study them. There may be something else come up, because this is a very important business

(Testimony of Glenn H. Fisher.)

for us and we feel it should be an important venture for you, and it is very essential that we have a perfect understanding."

Q. When he returned them, did he make any further inquiry about them?

A. No, I don't believe he did.

Q. Did he ask you anything about them then?

A. No, he never asked me.

Q. Where did he sign the manager's contract that you mentioned?

A. In Portland, Oregon, after I came up.

Q. About what time?

A. That would be about March 4th or 5th, right shortly after the first of March.

Q. How did you handle the execution of this franchise, July 1, 1946?

A. I beg your pardon?

Q. It bears your signature and Mr. Brewer's signature. Would you tell the Court how that was handled in its execution?

A. Well, I had talked to Mr. Brewer at the time of his coming [336] north. He didn't wish to come north without a contract and he wanted a franchise contract, but I explained to him that possibly for a month or two or three he would be better off from a financial standpoint to go on a managership agreement, and he said he could get along on \$250 a month, and that was the agreement he went on, and if the business prospered and was handled correctly he would naturally, under that agreement, be able

(Testimony of Glenn H. Fisher.)

to earn more than \$250 a month, so I had more or less set the 1st of July, which was about three months from then, as a good time for him to go under our regular franchise agreement, due to the fact that we were in the process of incorporating our business, making us a corporation rather than a partnership, and at that time we could go into our regular franchise agreement with him as a corporation, and it was very agreeable to him.

Q. Where did you sign that franchise of July 1st, 1946? A. In our Oakland office.

Q. Had Mr. Sibert signed it then?

A. No, he hadn't.

Q. I don't mean Mr. Sibert. I mean Mr. Brewer. Had Mr. Brewer signed it then?

A. No, he hadn't.

Q. What did you do about getting his signature?

A. I sent him two copies in the mail—I signed two copies and put them in the mail and sent them to Oregon to Mr. Brewer [337] in Oregon for his signature.

Q. When did you do that?

A. That would be in July, the forepart of July or, rather, possibly the latter part of June, somewhere along in there.

Q. How long was it before you got them back?

A. Oh, I would say a week, approximately the time that it would take the mail to come up and be returned.

Q. Did you get them both back or one?

A. One, my copy.

(Testimony of Glenn H. Fisher.)

Q. When you received it back, was Mr. Brewer's signature on it? A. Yes, it was.

Q. When did you again see Mr. Brewer?

A. From what date, sir?

Q. Any time after July 1, 1946, any time after July 1st?

A. July 1st, 1946. I was just trying to think, Mr. Rankin.

Q. Let me get at it this way: When did you again come to Portland, Oregon, after July 1st, 1946?

A. I believe it was in August I came through here on my vacation and just merely stopped off as I was going through.

Q. When did you again come on any business trip?

A. Never came on another business trip until after the breach of this agreement.

Q. Did you see Mr. Brewer in Oakland in November, 1946? A. Yes, sir. [338]

Q. Where did you see him?

A. In Mr. Sibert's home.

Q. Mr. Brewer claims he came there with his wife in protest against your treatment of him in the Oregon territory. Did you have any conversation with him about the business in Oregon?

A. Not other than "How are things going?" And he seemed to be very well satisfied. He had an expression which he used at that time. He said, "It is the best in the West." That is the way he was explaining to me how he felt things were going in Oregon.

(Testimony of Glenn H. Fisher.)

Q. I believe the testimony shows that you were here in June, 1947. No, I beg your pardon. I believe the evidence shows that were again in Mr. Sibert's home in June, 1947? A. That is true.

Q. Did you see Brewer then?

A. Yes, I saw Mr. Brewer at that time.

Q. Did you discuss the Oregon business with him then?

A. Well, it was almost identical. I travel a great deal and, as I remember, on that trip I was just returning from Los Angeles. I heard Mr. Brewer was in town so I dropped in to visit a while on my way home.

Q. From the time you met Mr. Brewer until this June meeting in 1947 in Mr. Sibert's home, had he ever told you or anyone connected with the company in your hearing that he was going [339] to drop this business, this franchise?

A. No, sir. When that happened, we were all very much dumbfounded. We could hardly believe it.

Q. Was there anything in any of his conduct at any time that gave you any warning that he was terminating his agreement?

A. Not in my presence, no, sir.

Mr. Rankin: You may cross-examine.

Cross-Examination

By Mr. Bernard:

Q. At the start of your examination you said it had been decided something had to be done with the Portland office. Is that correct? A. Yes.

(Testimony of Glenn H. Fisher.)

Q. Whom did you discuss that matter with?

A. Mr. Sibert, Mr. Hilts, I believe, and—At least Mr. Sibert and myself.

Q. What was the reason that something had to be done with the Portland office?

A. Well, it just so happens that the former employee is in the courtroom today, so I will *be speak* very frankly. We felt that the business was not being *taken of* adequately; there were complaints, particularly from our largest customer, the Southern Pacific Company, and when I came up here this former employee said, "Mr. Fisher, I don't blame you. I expected it several months ago."

Q. In other words, conditions in the Portland office were not satisfactory?

A. As far as service was concerned.

Q. When you saw Mr. Brewer, you discussed both forms of contracts with him?

A. That is true.

Q. The manager's contract and the franchise form of contract?

A. That is true.

Q. Was it in California that you claim to have turned over copies of them to him?

A. That is right. It was in Oakland.

Q. You say that he took those away from the office?

A. That is true.

Q. How long did you say he had them?

A. I would say two or three days. It seems to me—I wouldn't be positive, but it seems to me like this was along the latter part of the week and he

(Testimony of Glenn H. Fisher.)

was to come to work Monday morning. I believe he took them home with him over the week end and familiarized himself with them.

Q. That was before he had done any work in pest control? A. That is true.

Q. You knew that he was totally ignorant of the pest control business?

A. That is right, other than what conversations we had had prior to giving him the contract and talking contract, as we [341] always do to a man that has no understanding of any of this business; we would explain the thing, the nature and type of our work, and tell him about the dirty part of it as well as the good part of it, so he can make up his mind as to whether he considers himself the type of a person that would adapt himself to this business.

Q. Did he want to sign a contract before leaving Oakland? A. For Portland?

Q. Yes.

A. He desired to sign a contract. He didn't—He said he didn't want to go anywhere without having a contract and at that time he wanted the franchise contract.

Q. Why didn't you have him sign a contract before he left Oakland?

A. Because at that time our former manager had not been notified of our decision to replace him, and I felt that that would be getting the cart before the horse to have one man have a contract in a district where another man already had a contract.

(Testimony of Glenn H. Fisher.)

Q. So he came up here with no written contract at all?

A. That is true, but with the promise of one.

Q. After he got here he signed what was known as the manager's contract? A. That is true.

Q. What compensation was he to get under that manager's contract? [342]

A. Under the manager's contract he received \$250 a month guarantee with 20 per cent of the net profit, over \$600, monthly base.

Q. Over \$600 monthly, net monthly base?

A. That is right. He got \$250 out of the first \$600, and run the business, paid the expenses on the first \$600 of business. If there is anything left out of the first \$600, he got it. Further than that, he got 20 per cent of the net profits.

Q. Was this \$250 paid out of that \$600?

A. That is correct. That was included.

Q. So, under that form of contract, he would get \$250 a month guarantee or \$3,000 a year and then anything over \$600 net profit?

A. No, sir.

Q. What? A. No, sir, I didn't say that.

Q. All right. You tell me.

A. He got his 20 per cent of the profit, net profit, of all business done over \$600.

Q. How long did this manager's contract have to run by its terms?

A. By its terms it could be canceled within thirty days by either party.

(Testimony of Glenn H. Fisher.)

Q. Subject to a 30-day cancellation? [343]

A. That is true. He was put on that basis just for the first two or three months, according to my more or less understanding with him.

Q. What do you mean your "more or less understanding with him"?

A. All right. He asked me about the franchise when he came up here, and that is when I told him that he should not go on the franchise; that he would make more money and would be better off to go on a managership franchise or a managership agreement, and I felt that if he would go in and do his work and finish all the work which was laid out here that he would then be in a very fine position to go on the franchise agreement on July 1st.

Q. Where did you discuss the matter with him after he came to Portland?

A. You mean on the first trip here?

Q. Yes.

A. In the hotel room, I believe it was, or at Mr. Taylor's home where our office was at that time. I would not be sure.

Q. I mean with reference to this franchise contract.

A. I didn't discuss it at that time. We had made our discussion on that score before he left Oakland. I merely had the contract with me and he seemed to be very familiar with it. He didn't hesitate to sign it. He said, "Where is your pen?"

Q. Did you bring it to Portland? [344]

A. I brought the contract to Portland with me.

(Testimony of Glenn H. Fisher.)

Q. For his signature?

A. For his signature.

Q. For what other reason did you come to Portland?

A. To terminate our agreement with Mr. Taylor, our former manager.

Q. When did you terminate your agreement with Mr. Taylor?

A. Let's see. I imagine—I think it was the 4th or 5th of April, the first week of April.

Q. That is when you had Mr. Brewer sign the manager's agreement? A. That is true.

Q. What did you do towards having it changed over to a franchise agreement as of July 1st?

A. I had nothing to do with it other than our discussion with Mr. Sibert in that regard in our Oakland office.

Q. Mr. Sibert was the man who told you to prepare the franchise agreement?

A. No, he didn't tell me to prepare that agreement at all.

Q. You had nothing to do with Mr. Brewer signing that franchise agreement?

A. No, sir, other than sending it up there after the boundary or territory part of it had been filled in.

Q. When you sent it up, was it signed?

A. When I sent the two copies to Mr. Brewer?

Q. Yes.

A. Yes, I signed the two of them.

(Testimony of Glenn H. Fisher.)

Q. You signed the two of them and sent them up? A. Yes.

Q. You were not, of course, present when he signed it? A. No.

Q. Who delivered it to Mr. Brewer for signature? A. I mailed it to him.

Q. For signature? A. That is true.

Q. Do you know if anybody discussed it with him prior to July 1st?

A. Prior to July 1st? Yes, I think Mr. Sibert had. I don't know. He probably did.

Q. Isn't it a fact Mr. Sibert made the contract up in Portland here?

A. With the exception of the boundaries, and for that reason Mr. Sibert would not sign a contract here without first consulting me on the boundary situation. Mr. Brewer, as I recall the conversation with Mr. Sibert, had requested a portion of the State of Washington to be included into the franchise because of the proximity, particularly of Vancouver across the river, and we would not write that in the franchise. Mr. Brewer, if I am not mistaken, was left a copy of this exact franchise as it was typed here under Mr. Sibert's orders, and two of them [346] were brought to Oakland, that is, the two that were used to fill in the boundary, to have the boundaries of the territory put in, and that was typed in Oakland and I signed them, inasmuch as I had more or less promised or intimated to Mr. Brewer that his franchise would start July 1st, and mailed them to him.

(Testimony of Glenn H. Fisher.)

Q. When was this concern incorporated?

A. July 1st, 1946.

Mr. Bernard: That is all.

Mr. Rankin: That is all.

(Witness excused.)

Mr. Rankin: That is our case in chief, if your Honor please.

Plaintiff rests.

STIPULATION

Mr. Bernard: If your Honor please, before I proceed with the testimony, Mr. Smith has kindly agreed to stipulate with me that the original complaint filed in the Circuit Court of the State of Oregon for the County of Multnomah, Paramount Pest Control Service, a corporation, vs. Charles P. Brewer, Raymond Rightmire, Carl Duncan, Earl Merriott and Rosalie Brewer, which, as we have said, involves the same matters involved here and which was verified by Mr. T. C. Sibert, contains the following allegations with reference to this franchise contract:

“That notwithstanding the written provision 27 of said agreement, the parties did not, and do not intend that the laws of the State of California shall govern any or all questions that may arise concerning the validity, construction or interpretation of this agreement, nor did they intend that any civil action which might be filed had to be filed in the State of California.”

Mr. Smith: That is correct, your Honor.

Defendants' Testimony

RAYMOND RIGHTMIRE

one of the defendants herein, being first duly sworn,
was examined and testified as follows:

Direct Examination

By Mr. Bernard:

Q. Mr. Rightmire, where do you live?

A. In Portland, Oregon.

Q. How long have you lived here?

A. Since August, 1946.

Q. Where did you live prior to coming here in August, 1946?

A. I lived in Vancouver, Washington, two years.

Q. When did you first go into the pest control business?

A. It was in May, 1946.

Q. May, 1946?

A. Yes. [348]

Q. And where was that?

A. It was in Portland, for the Paramount Pest Control Service.

Q. Was it at that time that you signed this statement about not—Wait until I find it—this statement appearing on page 8 of the complaint starting out "Because I do have a limited knowledge of the exterminating, pest control, or termite business, and do not know any formulas, processes, methods, or other trade secrets thereof, I agree," and so forth? Was it at that time that you signed that statement?

A. Yes, near that time.

Q. About in May?

A. Yes.

(Testimony of Raymond Rightmire.)

Q. Did you at that time have any knowledge of the exterminating business or pest control business?

A. Very little.

Q. Who hired you?

A. Mr. Sibert of the Paramount Pest Control Service and Mr. Brewer.

Q. After you were hired, what did you do?

A. Oh, I immediately began traveling around with Mr. Duncan for about three days.

Q. What information did Mr. Duncan give you?

A. Well, he showed me how to cut up carrots and apples and things like that and put them in a one-gallon can and stir it up and put a little chemical on it or poison, and we ran [349] around these buildings, around the baseboards, and dropped little pieces here and there; and he showed me a little bit about roaches, how to exterminate them, or about how it was done.

Q. What did he show you about exterminating roaches?

A. He had a little bit of a puffer that laid in the palm of his hand, with a little powder in it, and he went around the cracks where roaches might be, showed me where they might be in there—that was the principal thing that Mr. Duncan showed me.

Q. You say you worked with him for about three days?

A. That is right.

Q. At any time were any formulas, processes or methods or trade secrets given to you?

A. No, not that I know of.

(Testimony of Raymond Rightmire.)

Q. After these days what did you do, Mr. Rightmire? A. I went to work by myself.

Q. Did you continue to work by yourself from that time on? A. Yes.

Q. Just tell the Court how you would work. In other words, would you be given the names of persons to go and call on, or what?

A. There was a list of customers around there in the office in the Kardex form, and principally those at first was trouble calls, continuous trouble calls. The phone was ringing whenever [350] I was in the office, and when I was out I called in to the office and it was always troubles. Two-thirds of my time, after the first days, were spent on troubles.

Q. Then, after that period, how did you work?

A. Well, after that period of time, the salesman that was with the organization at that time was contacting people, and I was working behind him. I did have to learn about exterminating these pests myself. Something that no one seemed to be able to show me in the Paramount organization was how to exterminate them. They were servicing these customers, and they didn't show me how to get rid of them.

Q. You say you learned that yourself?

A. Yes.

Q. How long did you continue to work for them, Mr. Rightmire?

A. Beginning or near the first of July I was told by Mr. Hilts and I was told by Mr. Brewer

(Testimony of Raymond Rightmire.)

that I was no longer at that time working for Paramount Pest Control Service, a partnership; that I was working for Charles P. Brewer, and I felt, due to the fact of this little slip that I signed, that I was no longer obligated to them, since I was not working for them, for that partnership.

Q. Mr. Hilts told you that?

A. Mr. Hilts and Mr. Brewer.

Q. After July 1st, how did you continue?

A. Well, we were continually making an effort and endeavoring [351] to exterminate pests in order to hold these accounts, and we did settle this cancellation business within three months or four. I recall in that time very long hours of hard work and uncertainty, because I didn't know all about it.

It was during that time, it seems to me, about three months after that Mr. Sibert came—I believe he flew up here—and as I came to work that morning Mr. Brewer drove up with his car, with Mr. Sibert in the car, as I was walking up Park Avenue to our office.

Mr. Sibert stepped out of his car in the presence of Mr. Brewer and myself and he said, "Ray, you fellows have done a wonderful job here," and he said, "You have brought this thing out of the red for the first time, the first time that the Portland territory was ever out of the red."

I thanked him and told him that I thought we had done all right, due to the fact that our knowledge was limited and that our education had been

(Testimony of Raymond Rightmire.)

slightly neglected along those lines, and he turned to Mr. Brewer and said, "Charlie, remind me to send this boy a course in chemistry right away," but I never got that course in chemistry.

Q. Can you figure about what month that was, Mr. Rightmire?

A. It must have been in July, June or July. Dates didn't mean much to me. I don't keep a diary.

Q. Did you go on vacation in July?

A. That was in 1946, that other statement. Yes, I did. [352]

Q. How long did you continue that work, through 1946 and 1947?

A. I am going to make a correction here.

Q. Yes.

A. I didn't go on vacation in July, 1946.

Q. What work did you continue to do throughout 1946, say, for the first half of 1946?

A. It was mostly in extermination of rats, mice and roaches. There was an occasional ant job. I think during my employment by Paramount that there was not over eight or ten jobs of ant control or ant extermination.

Q. How would you do those jobs?

A. Well, we had some ant cups, they call them, and we put those around, but they didn't do any good. In fact, it looked to me as if the ants was getting fat on them, so we tried other things, and eventually that roach powder and everything else

(Testimony of Raymond Rightmire.)

that satisfied the customer, but to this date I am not a good ant exterminator.

Q. Did you go on vacation in July, 1947?

A. Yes.

Q. When did you go?

A. Went to Camp Sherman.

Q. When?

A. It was the very last part of July.

Q. You went to Camp Sherman? [353]

A. Yes.

Q. How long were you down there?

A. I think we were up there three or four months.

Q. Prior to your leaving, Mr. Rightmire, did you know that Mr. Brewer had severed or intended to sever his connection with Paramount Pest Control Service? A. I did not.

Q. When did you first receive any information that Mr. Brewer had severed or intended to sever his connection with Paramount Pest Control Service?

A. When I asked Mr. Brewer for this vacation, which was much overdue, he told me he would let me have the vacation, that he thought it was earned, that I was entitled to it, and then he didn't know at that time whether he would still be manager of Paramount when I returned.

Q. Did he make any further statement about that? A. Not that I remember of.

Q. You returned when?

A. Three or four days later: the exact dates I don't recall.

(Testimony of Raymond Rightmire.)

Q. Do you remember being over at Mr. and Mrs. Brewer's house about July 30th when Wendy Fisher came over there?

A. I went over there and returned Mr. Brewer's fishing equipment. I had borrowed it to go fishing on my vacation. I was visiting with Mrs. Brewer, as Mr. Fisher said.

Q. Had you been informed then Mr. Brewer was severing his [354] connection with the company?

A. I had not been completely informed then.

Q. You had not been completely informed? What information did you have?

A. I knew by his statement before I went that he was going to break with them, but I hadn't got to talk to Charlie myself right at that time.

Q. That was about the time you went on your vacation?

A. About the time I went on my vacation, yes.

Q. What was the conversation, as you recall it, over in the Brewer home on July 30th when you returned this fishing equipment to Mr. Brewer here?

A. Mr. Fisher was in there. I and Mrs. Brewer was visiting there, and he came in and, I don't know—we were all in a very jolly mood. I was happy over having a vacation. I didn't make any statement; neither was there a statement made there concerning the fact that I had my vacation pay and if I hadn't got it I never would have got it. That statement was never made, nor there was no statement made there of that kind that I recall at all.

(Testimony of Raymond Rightmire.)

Q. What is your recollection of the conversation with Mr. Fisher?

A. I don't remember much of it. It was very short. I returned Charlie's equipment. I really don't recall right off.

Q. When did you receive any definite information that Mr. Brewer had resigned or had severed his connection, we will say, with [355] Paramount Pest Control Service?

A. After we left the house—I left the house and Mr. Brewer followed me to his car and told me that he was done with Paramount.

Q. That was on July 30th?

A. I think so, yes.

Q. Did you see Mr. Hilts within a day or two of that time?

A. Yes, Mr. Hilts called at my home.

Q. Do you remember what date?

A. I think it was the 31st. I am not sure of that.

Q. What was the conversation between you and Mr. Hilts at that time?

A. Mr. Hilts came to my home. It was a nice day and we sat out on the steps. He told me he regretted that I had been sick and called mainly for that purpose, that I had been sick and he was there to console me.

I remember very distinctly that I told Mr. Hilts right there that I would not believe, under any consideration, anything that Mr. Sibert would have to say to me, although I assure you there was no profanity used in our conversation.

(Testimony of Raymond Rightmire.)

Q. What else did you talk about?

A. Well, that immediately led to a conversation of Mr. Merriott.

Q. What was that?

A. Mr. Merriott, an employee.

Q. What was said about Mr. Merriott? [356]

A. He asked me if Mr. Merriott was a good exterminator. I told him he was a good exterminator. He said, "We might want to use him for a while."

Q. Anything further said that you recall?

A. He soon drifted to the subject of personal affairs and we sat down and visited cordially of what we had done in the past.

Q. When did you go to work for Brewer's Pest Control?

A. Shortly after the 1st of August, 1947.

Q. Tell the Court how you happened to go to work for Brewer's Pest Control? Who approached you?

A. Mr. Brewer approached me on that.

Q. What did he have to say?

A. He asked me if I would care to work for him in the pest control business. Knowing Mr. Brewer, knowing he had dealt fair with me and everybody else that I ever saw him deal with, knowing he was honest and had given me a fair deal, and not then having a job or any way to make a living for my family, I accepted the offer.

Q. By the way, how do you mean work? What sort of an arrangement did you have as to compensation?

A. He pays us each week.

(Testimony of Raymond Rightmire.)

Q. Is that the way you were paid prior to the organization of Brewer's Pest Control?

A. Yes, we were paid weekly.

Q. You were getting a weekly wage? [357]

A. That is right.

Q. Mr. Rightmire, did you have any understanding, directly or indirectly, with Mr. Brewer, or with any other person, that you would quit the Paramount Pest Control Service and attempt to take over their business? A. No.

Q. Was that matter discussed between you and Mr. Brewer at all?

A. It was not discussed at all.

Q. But did you discuss it with any other person?

A. No other person.

Q. Is your only interest in this thing as a wage earner?

A. That is right. I am just a working man.

Q. What kind of work have you done for Brewer's Pest Control?

A. Exterminating work.

Q. Did you have any list of the customers of Paramount Pest Control Service?

A. I did not.

Q. Have you done work for persons who were former customers of theirs? A. Yes, sir.

Q. Have you secured other accounts as well?

A. Yes, sir.

Q. What part of the state do you work in?

A. Well, I was—I did work for Mr. Brewer in the Eastern [358] Oregon territory last but since

(Testimony of Raymond Rightmire.)

the 1st of November, I believe, I have worked more in the west and southern parts of the state.

Q. Have you done work for Brewer's Pest Control for the Sugar Bowl in The Dalles?

A. Not for Brewer's Pest Control, no.

Q. Or for the Peasley Transfer or Transportation Company in Boise, Idaho?

A. I have not.

Q. Or for The Dalles Hotel?

A. I have not for The Dalles Hotel. Explanation there—The Dalles Coffee Shop which has an owner by itself, I worked for them.

Q. You have worked for the coffee shop in The Dalles Hotel? A. Yes.

Q. There is some evidence here that somebody told somebody else that somebody representing Brewer's Pest Control had told them that Paramount was dissolving, that Brewer was really a change of name from the Paramount Pest Control Service. Did you ever make any statement anywhere like that to anybody connected with The Dalles Hotel or The Dalles Coffee Shop?

A. Absolutely not.

Q. Did you make any statement of that kind to any person at any time? A. No.

Q. Have you at any time in your work for Brewer's Pest Control [359] made any statement at all regarding the Paramount Pest Control Service?

A. I have not.

(Testimony of Raymond Rightmire.)

Q. Are you now in possession of any formulas, trade secrets or processes of any kind furnished to you by Paramount Pest Control Service?

A. No, I have none in my possession at all.

Q. Did they ever furnish you with any?

A. No.

Mr. Bernard: You may cross-examine.

Cross-Examination

By Mr. Rankin:

Q. Mr. Rightmire, you said the matter of your instruction when you first went to work for Paramount Pest Control Service was very meager?

A. Very simple, yes.

Q. In other words, it was very poor instruction?

A. No, sir; it was just of very short duration.

Q. What was the character of that instruction that you did receive?

A. As far as the instruction I had, it was good.

Q. When did you go to work for them?

A. In May, 1946.

Q. As I gathered the import of your testimony a moment ago it was that you had not had very much instruction, that they [360] just showed you a few places where you might put down something that some pest or rodent might eat?

A. Yes, that was in the instructions.

Q. Will you tell the Court whether the instruction you received when you began in May, 1946, was good or bad?

A. What instruction I had was good.

(Testimony of Raymond Rightmire.)

Q. Who was in charge at that time?

A. The instructor, you mean?

Q. Yes. A. Mr. Duncan.

Q. Mr. Duncan? A. Yes.

Q. And he is now associated with you in the Brewer's Pest Control, is he not?

A. He is an employee of Mr. Brewer.

Q. You are associated with him in that same business, are you not?

A. I am an employee of Mr. Brewer.

Q. Will you answer the question?

(Question read.)

A. Yes.

Q. You were also a defendant in the case that was brought by Paramount Pest Control Service in August of 1947, were you not? A. Yes.

Q. And you were served with a copy of the complaint in that [361] case? A. Yes.

Q. And that charged you, did it not, with violating your agreement that you would not go into the business for a period of three years after your employment ceased? A. Yes.

Q. And you went right in business with Mr. Brewer even after you had been served with that complaint, did you not?

A. I am an employee of Mr. Brewer's.

Q. Answer the question, please.

A. I am not in business with Mr. Brewer.

Q. You went on in the pest control business, irrespective of the fact that you were served with a copy of the complaint, didn't you? A. Yes.

(Testimony of Raymond Rightmire.)

Q. You knew at the time you were going in the pest control business that you were serving the same accounts in behalf of Mr. Brewer that you had previously served in behalf of Paramount Pest Control Service? A. Some of them.

Q. Some of them? A. Yes.

Q. What percentage? A. I wouldn't know.

Q. You have a very good idea, haven't you?

A. I am not a bookkeeper.

Q. I didn't ask you that. I said you had a pretty good idea?

A. I have no idea of the percentage.

Q. Many or very few?

A. I don't understand that question exactly.

Q. Well, let's go back to the beginning. You served customers who wanted their services, services of the Paramount Pest Control Service, in connection with pests, did you not?

A. For Paramount?

Q. Yes, Paramount Pest Control Service?

A. Yes.

Q. You knew that they were under contract with Paramount Pest Control Service, did you not?

A. Yes.

Q. And you made reports upon this service to the Paramount Pest Control Service?

A. Yes.

Q. Whenever you serviced an account, you wrote out a slip saying that you had serviced it on such and such a date, for such and such a pest, did you not? A. Yes.

(Testimony of Raymond Rightmire.)

Q. After August 1st you did the same thing for Mr. Brewer, didn't you? A. Yes. [363]

Q. When you found that you, in working for Mr. Brewer, were servicing some, at least, of the same accounts that you had serviced for Paramount Pest Control Service, did you inquire of Mr. Brewer what his purpose was?

A. I don't quite understand that question.

Q. When you found that you were serving the same accounts for Mr. Brewer that you had served for Paramount Pest Control Service, did you inquire why you were doing so, from Mr. Brewer?

A. No.

Q. Did you have any discussion with him as to how he could serve Paramount's accounts that had been under contract when he was no longer connected with Paramount?

A. I didn't discuss that with him.

Q. Why not? A. I had no reason to.

Q. Well, weren't you curious to know?

A. Not at all.

Q. How did you get the names of Paramount customers?

A. I solicited all potential customers.

Q. That is not my question.

A. And that is how I got the names of Paramount customers.

Q. You knew they were Paramount customers before you even went there?

A. There was no list.

(Testimony of Raymond Rightmire.)

Q. Answer the question. You knew they were Paramount customers [364] before you went there, didn't you? A. Why, sure.

Q. You had served them, hadn't you?

A. Certainly.

Q. Did you have any list of Paramount customers, as such? A. No.

Q. You remembered them, didn't you?

A. Yes.

Q. If you served Albers Brothers, you would know if you had served Albers Brothers before August 1st? A. Certainly.

Q. If you served them afterwards you knew that you were serving them for a different person than Paramount Pest Control Service?

A. Certainly.

Q. Now, you spoke particularly of July. Did any of these customers of Paramount, after Mr. Brewer told them he was no longer associated with Paramount, and you went in representing Brewer, did they ask you what the trouble was?

A. Yes.

Q. Did you tell them what the trouble was?

A. Surely.

Q. Did you tell them what Mr. Brewer had told you? A. What was that?

Q. I say, did you tell them what Mr. Brewer had told you? [365] A. I told them——

Q. Just answer my question. Did you tell them what Mr. Brewer had told you?

A. I don't know what you are contending Mr. Brewer told me.

(Testimony of Raymond Rightmire.)

Q. Did Mr. Brewer tell you anything?

A. Yes.

Q. What did he tell you?

A. He told me he was in business for himself.

Q. Did you make no inquiry about his contract or his franchise?

A. I didn't have any reason to.

Q. That is not answering my question. Did you?

A. I didn't make any inquiry.

Q. You did not? A. No.

Q. You were willing to just accept the situation, and go on, without finding out how Mr. Brewer had any right to go on with this pest control business, when you were advised by the complaint that was filed that he was violating his franchise, is that correct?

A. I don't understand the question.

Q. What do you want? Time to think?

Mr. Bernard: I object to that.

The Court: Go ahead.

(Question read.)

A. Yes. [366]

Q. (By Mr. Rankin): You only took a few days out of July, 1947, for a vacation, didn't you?

A. That is right.

Q. What date did you leave Portland?

A. I don't remember dates, exactly.

(Testimony of Raymond Rightmire.)

Q. The first part or the last part?

A. The latter part of July, though, sir.

Q. For your vacation? A. Yes.

Q. What business were you working in before you left? A. Before I left for a vacation?

Q. Yes.

A. I was working for Paramount Pest Control Service.

Q. And where were you working for Paramount Pest Control Service?

A. I had been working in the Eastern Oregon territory

Q. When did you leave Portland to work on the Paramount Pest Control Service in Eastern Oregon? A. Some time the first part of July.

Q. And where did you go?

A. Went to Eastern Oregon.

Q. Whereabouts in Eastern Oregon?

A. That *would* The Dalles, Hood River, Pendleton——

Q. Where did you go after you left there, do you remember?

A. I imagine it was Hood River, up that way.

Q. Then where did you go?

A. From Hood River to The Dalles, Pendleton, Heppner, Hermiston, LaGrande, Baker, Union——around that territory as the main highway runs.

Q. Did you go to Boise? A. Yes, sir.

Q. The record here shows that a cancellation came in to Paramount Pest Control Service from concerns on your route very shortly after your visit to that section. Can you account for that fact?

A. I could, in one way.

(Testimony of Raymond Rightmire.)

Q. All right; any way that is the truth.

A. They sent their man into that territory and he told patrons of Paramount Pest Control that I was not only completely out of pest control but that I was in jail and that I was in court, and those people out there knew me personally, Mr. Rankin, and they knew I was not in jail.

Q. They saw you, didn't they?

A. They saw me after the man had told them that. That is why they lost customers out there.

Q. What man told you that?

A. The territory generally, in every town that was told to me.

Q. Can you name an instance?

A. At the Dairy Co-Operative Association in Hood River.

Q. Who was the Paramount man that they said told them that [368] you were in jail?

A. Mr. Elfers, if I remember right.

Q. Mr. Elfers? A. Yes.

Q. When did he see the accounts that you saw?

A. That I wouldn't know.

Q. This record will show that in some instances there were accounts that you called on, and they wanted to know whether you were still with Paramount. Would you think that Mr. Elfers was the one who had breached any business ethics if they laid the cancellations onto you?

A. It was through his contact——

Q. What if a customer says that you made the statement that they were not competent to carry on this business?

(Testimony of Raymond Rightmire.)

A. I would like to have you get one of those customers in here.

Q. I suppose you would. It is a safe thing to say. They did not believe you were in jail when they saw you there?

A. No, but they formed an awfully bad opinion of the man that had claimed that I was.

Q. I should think they would, if he made that statement. You went on as far as Boise and you also went to Bend, did you not? A. Yes.

Q. You wish to tell this Court that you didn't know all the [369] time you were making this trip that Mr. Brewer was going in for himself?

A. I don't wish to tell the Court that.

Q. What do you wish to tell the Court about your knowledge of whether, when you were serving on this trip, you were going to continue to serve Paramount Pest Control customers?

A. Is that a question? I didn't understand.

(Question read.)

A. I was serving the customers of Brewer's Pest Control then. They had agreed to and wanted my services.

Q. Did you solicit them?

A. Lots of them, yes. I solicited all potential business in every town.

Mr. Rankin: That is all.

Mr. Bernard: That is all.

(Witness excused.) [370]

EARL MERRIOTT

was thereupon produced as a witness on behalf of defendants and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Bernard:

Q. Mr. Merriott, where do you live, sir?

A. 706 Southeast Fourteenth Avenue, Portland, Oregon.

Q. How long have you lived in Portland?

A. Oh, about twenty-four years.

Q. When did you go into the pest control business?

A. I went in in the first part of February, 1947.

Q. Had you ever been in that business before?

A. No.

Q. When you entered their employ, what did you do?

A. I spent about three or four days with Ray Rightmire, who was showing me more or less of the groundwork on pest control.

Q. You went around with Mr. Ray Rightmire. What did Rightmire show you?

A. Oh, more or less putting out bait for rats.

Q. How did he tell you to do it?

A. We used vegetables, fish and meat, whatever was called for, and mixed it up in a gallon can or container and he showed me the use of the poisons, or the amount to put in, and we placed it out at what he was telling me was safe places in restaurants or wherever the place was we was servicing.

(Testimony of Earl Merriott.)

Q. How long did you work with Ray?

A. About four days.

Q. Were you at any time furnished with any formulas or trade secrets or things of that kind?

A. No, sir.

Q. After working four days and watching Rightmire do that work, what did you do then?

A. I went strictly on my own. I would be at the office at 8:00 o'clock in the morning and either Mr. Brewer or Mr. Rightmire would line me out on my stops for the day, which I made.

Q. How long did you continue to work in that fashion?

A. I worked until the last part of July, about the 30th or 31st.

Q. When, if at all, was the first time you knew Mr. Brewer had severed or intended to sever his connection with Paramount Pest Control Service?

A. I don't remember the exact date, but it was on a Saturday around a little after noon. Mr. Hilts and Mr. Brewer and—I don't remember exactly if Mr. Duncan was there at that time or not—but it was out at Mr. Brewer's home and Charlie told me that he was through, that I would be no longer working in his employment.

Q. You say that was the last of July?

A. Yes.

Q. On a Saturday afternoon? [372]

A. Yes.

Q. Mr. Hilts was there? A. Yes.

(Testimony of Earl Merriott.)

Q. Did you have any information at all, either directly or indirectly, from Mr. Brewer on that subject prior to that time? A. No, sir.

Q. Had he ever talked to you about forming his own company and you going to work for him?

A. No, he hadn't.

Q. There is testimony at some place in this case that one of these Paramount Pest Control Service men, about that time, asked you if you were going to work for Paramount. A. Mr. Hilts.

Q. Was it at that time?

A. It was at that time.

Q. That was the first information you had?

A. That is right.

Q. What did you tell him?

A. I didn't tell him anything. He told me. He says, "You know that Brewer is breaking from Paramount?" And I said, "I had heard something but I didn't know what it was all about," and he wanted to know if I would continue to work for Paramount and I said, "Well, if Brewer is out, I want to make a living and I do like pest control and I will work for you."

Q. Why didn't you go to work for them? [373]

A. Well, at that time, that particular time, I was having car trouble and was working on my car at Brewer's home.

At that time I was working on my car. My car had broke down and I was working on it at Brewer's home, and I finished the job, oh, late in the afternoon. As Mr. Rightmire had been more or less on

(Testimony of Earl Merriott.)

the sick list, I dropped out to see him, and that is when I heard that he was through with them, that they had offered him some agreement, better than his position was in the past, and he had turned it down. Well, I was more or less curious to find out why.

The only thing he would tell me, he said, "Well, they want you to work for a while, but only for a while," and that I probably would not last very long. That statement was made to him by Mr. Hilts.

Mr. Rankin: How do you know?

Q. (By Mr. Bernard): Mr. Rightmire claimed that statement was made by Mr. Hilts?

A. Mr. Rightmire told me that statement was made by Mr. Hilts.

Q. When did you go to work for Brewer?

A. Oh, I believe it was the following Monday.

Q. When did Mr. Brewer contact you about going to work for him?

A. He didn't. I went over to talk to him, to find out.

Q. You went over there?

A. To find out what the score was and what he was going to do. [374]

Q. What?

A. I went over and talked to him, to see what he was going to do.

Q. What did he tell you?

A. He told me that he was going into business for himself, and asked me if I wanted to go to work for him and I said, "Yes."

(Testimony of Earl Merriott.)

Q. That was after this talk with Hilts?

A. With Hilts.

Q. Did you at any time enter into any agreement or understanding with Brewer or anybody else that Brewer was to quit Paramount Pest Control and that you boys would take over the business of the Paramount Pest Control Service? A. No, sir.

Q. What relationship did you have to the business? Did you have any interest in the business?

A. No, sir. I work for a weekly wage.

Q. What? A. I work for a weekly wage.

Mr. Bernard: I think that is all.

Cross-Examination

By Mr. Rankin:

Q. You said that you applied whatever poison there was for the pest. Did you know the kinds of pests? A. Yes. [375]

Q. Could you analyze what poison was best for them?

A. Not at that time, but Mr. Rightmire showed me.

Q. Did you know what ingredients were in the poisons that you used? A. No, sir.

Q. How did you know what poison was for what pest? A. Mr. Brewer told me.

Q. Mr. Brewer told you?

A. He supplied me with any poisons I needed.

Q. You were another one of the defendants in the case brought in the Circuit Court, weren't you?

A. Yes, sir.

(Testimony of Earl Merriott.)

Q. Did you ever know, before that case was brought, about Mr. Brewer's franchise?

A. No, sir.

Q. You knew it then? A. I heard of it.

Q. You saw it in your complaint, didn't you?

A. Yes.

Q. In that complaint in that case? A. Yes.

Q. You knew about Mr. Rightmire's agreement; you knew about Mr. Duncan's agreement from that, didn't you? A. Yes.

Q. Did that make any difference with you about going on and [376] serving with these men?

A. I was working for a living.

Q. It did not make any difference with you, then, did it? A. No.

Q. Did you also serve customers of Paramount Pest Control Service, whom you knew to be customers of Paramount Pest Control Service, before August 1st and Brewer's breach or leaving, the same customers that he served afterwards or that you served afterwards for Brewer?

A. Would you mind repeating that?

Q. Yes. Did you serve the same customers for Paramount that you later served for Brewer?

A. Some, yes.

Q. Did you solicit those customers?

A. I solicited any potential business.

Q. Including those that you knew were under previous contract with Paramount? A. Yes.

Mr. Rankin: That is all.

Mr. Bernard: That is all.

(Witness excused.) [377]

ROSALIE BREWER

one of the defendants herein, was thereupon produced as a witness and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Bernard:

Q. Mrs. Brewer, you are the wife of C. P. Brewer? A. I am.

Q. You were his wife before coming to Oregon?

A. Yes, I was.

Q. You and he moved to Oregon from California? A. Yes, we did.

Q. Will you tell the Court what work you did with reference to this pest control business for Mr. Brewer?

The Court: Do they have any children? Do these people have children?

Q. (By Mr. Bernard): Do you have any children? A. I have a daughter, yes.

Q. How old is she?

A. She is going on fourteen, in June.

Q. Go ahead.

A. I help my husband in the office, post things in the books. That only requires sometimes a couple of hours, or three days a week, sometimes not that much.

Q. I understand from Mr. Brewer just now that the daughter is a daughter of yours by a former marriage? [378] A. Yes, she is.

Q. How long have you and Mr. Brewer been married? A. Six years in April.

(Testimony of Rosalie Brewer.)

Q. Go on with your answer.

A. I posted things in the books for my husband because he couldn't. At first, when I worked at the office of Paramount was when my husband was manager and the Paramount Pest Control Service paid me \$35 a month for part-time work in posting things in the books, at that office, because they figured they could not afford to hire a full-time girl.

Q. That \$35 a month, was that paid to you out of Mr. Brewer's salary or paid by Paramount?

A. By Paramount Pest Control Service.

Q. That is when he was acting as manager?

A. That is right.

Q. Go ahead.

A. And after Mr. Brewer took the franchise, I continued to help him because he could not afford to hire a girl. I did not spend all my time at the office, because I also ran my home.

Q. Did you do just book work?

A. Yes, that is all. I am not a bookkeeper.

Q. Do you, yourself, have any personal knowledge as to the circumstances under which Mr. Brewer changed from a manager's contract to a franchise?

A. Yes. I was there when Mr. Sibert offered my husband a [379] franchise in our home.

Q. What was said at that time? That was in Portland?

A. This was in Portland.

Q. Go ahead.

A. It was in the breakfast room of our home. My husband called me from the living room and

(Testimony of Rosalie Brewer.)

told me what Mr. Sibert had told him and asked me, "What do you think, dear?" He said "It is our money, you know."

I said, "Well, we haven't much of a choice. We are here. We have our home here, and it is entirely up to you just what you do."

Q. Had you heard any of the talk prior to that time between Sibert and your husband?

A. Why, yes. Right after that Mr. Sibert told me that within a few years' time my husband would be giving me a thousand dollars a month to run my home, and I laughed and said, "I would not know what to do with a thousand dollars if he gave it to me."

Q. Was that before this franchise contract was signed? A. Yes.

Q. After that time you continued to do this book work, did you?

A. I helped my husband whenever he needed it, yes.

Q. Do you have any personal knowledge of what took place in March when they had some dispute over whether it was to be [380] divided on a 50-50 basis or not?

A. The only knowledge I had was when my husband turned to me——

Q. Just a minute. Was anybody there at the time?

A. Mr. Hilts and my husband and I were in the office when Mr. Hilts asked for franchise money

(Testimony of Rosalie Brewer.)

and my husband turned to me and asked me to make out a check. I hesitated and got red in the face. He yelled at me, which he doesn't usually do, and told me to make it out.

Q. That was the check that was drawn in March? A. That is right.

Q. You say your husband yelled at you. What did he say?

A. My husband does not usually speak very harshly to me.

The Court: You are lucky. Hardly any other woman can say that.

A. Maybe not, but I can.

Mr. Bernard: Well, go ahead.

A. He told me to make out that check in a certain tone of voice that he does not usually use.

Q. What did he say to Mr. Hilts?

A. Nothing at that time, except that he handed him the check.

Q. Were you with him when he talked to him?

A. No, sir, I wasn't.

Q. There is in evidence here a copy of a letter dated March 15th from Hilts to your husband. You are familiar with that letter, are you? [381]

A. I signed for it.

Q. When did that letter come to your home?

A. On a Sunday morning.

Q. Was it a special delivery letter?

A. Yes.

Q. Sent by airmail? A. Yes.

(Testimony of Rosalie Brewer.)

Q. And you signed for it? A. Yes, I did.

Q. Did you go down to Oakland with your husband in the latter part of June?

A. No, I didn't. I was in California, visiting my sister.

Q. Did your husband meet you there?

A. Yes, he did.

Q. About what date?

A. Around the last part of June.

Q. Did you go to Oakland with your husband, then? A. Yes.

Q. When did you get in Oakland?

A. We came from Cupertino, California, Monday morning to Oakland to the Paramount office.

Q. Did you see Mr. Sibert?

A. Not at the office. Mr. Fisher took us to the home.

Q. Mr. Fisher took you to Mr. Sibert's home?

A. Yes. [382]

Q. Tell the Court about what the conversation was, generally, in Mr. Sibert's home?

A. Well, they were friendly when we came in. That afternoon he told me that I didn't need to work myself and I asked why. I didn't understand it. I said, "I don't understand what you mean at all," and he said, "Well, Charlie can afford to hire a girl now."

I said, "Well, I don't see where he can, where I have been doing that," and I said, "I don't see why he has to get a girl at \$150 a month when it just

(Testimony of Rosalie Brewer.)

takes me a short while to do that work, and I could use it myself," and he said, "Rosalie, Charles has made \$10,000 in this last year," and I said, "I haven't seen a cent of it."

Q. What happened then?

A. I felt very bad about it, enough so I was mad about it.

Q. You knew about what he was making?

A. Yes, I did.

Q. Where did you go then?

A. Well, we had dinner there and then, later on in the evening, I went upstairs and I cried.

Q. With reference to that time, when did you return to Portland?

A. We came back to Portland the following day.

Q. By plane? A. By plane. [383]

Q. Were you informed then by anybody that there was any proposed change?

A. My husband did start to discuss it with me on the plane but I got ill, and then we talked about it after we got home.

Q. Well, what did he tell you?

A. He told me they wanted him to go back on the 20-80.

Q. Who wanted him to go back on the 20-80 plan?

A. Mr. Sibert wanted him to go back.

Q. Did your husband seem agreeable to that?

A. No, sir.

Mr. Bernard: I think you may cross-examine.

(Testimony of Rosalie Brewer.)

Cross-Examination

By Mr. Rankin:

Q. Did you know about the 20-80 plan, Mrs. Brewer?

A. Yes. My husband and I had talked about it, yes.

Q. When did you first learn about the 20-80 plan?

A. When he first took the franchise?

Q. July 1, 1947? A. That is right.

Q. Did you know of the 20-80 plan before that?

A. No.

Q. Your husband had never discussed whether or not he wanted to go under the franchise?

A. No, sir.

Q. Did he tell you when he had signed the 20-80 franchise? [384] A. I beg your pardon.

Q. Did he tell you when he had signed the 20-80 franchise?

A. He told me when he signed it, yes. I mean he signed it, yes, but I don't know the exact date. I wasn't with him.

Q. Some time in July, 1947?

A. Some time in July, yes.

Q. He subscribes that there was a change made in that 20-80 franchise some time after it was signed. Do you know when that change was made?

A. My husband and I went to Oakland in November. He was telling me that he could not go any longer on that 20-80 basis, that we were not

(Testimony of Rosalie Brewer.)

making any money, and that we had used all of our savings to live on that we had, and that was the reason we went to Oakland in November.

Q. Had you then determined not to go on with the franchise if you could not get a modification of it?

A. I am sorry. I didn't have anything to do with that myself.

Q. Did your husband——

A. I didn't think so much about it. He only discussed it with me.

Q. Your husband discussed it with you, did you?

A. He did talk about it, yes.

Q. Did he tell you whether or not he was going on with the franchise if he could not get a modification?

A. He didn't say anything about that one way or the other. [385]

Q. One way or the other?

A. No, sir, not to me.

Q. Your November conference was very satisfactory, was it not?

A. Yes, they were very cordial. In fact, the only conversation that I heard about was in the Athletic Club when Mr. Fisher came in—we had not seen him yet—and he shook hands around and said, "Hello." Ted Sibert said, "Charlie has agreed," and told him about it, and all I remember is that Mr. Fisher said, "Well, we can do that with Charlie, but we couldn't with Ossie in Seattle."

(Testimony of Rosalie Brewer.)

Q. How long was the 50-50 agreement, as you described it, to last?

A. Well, what my husband told me, it was to last from then on.

Q. You did not hear any conversation with any of the Paramount people at all?

A. No, I didn't.

Q. Did anyone tell you any different, at any time subsequently? A. What do you mean?

Q. Did anyone from Paramount tell you anything different? A. No, not me, no.

Q. You have testified that you were red in the face, I believe. A. I was.

Mr. Rankin: May I see the exhibits, please, and particularly [386] the check, the February check?

Q. This check that I hand to you is dated February 6, 1947. Is that your signature attached to it? A. That is my signature?

Q. Yes; is that your signature attached to it?

A. That is my signature, yes.

Q. Were they asking you for money at the time you signed this check?

A. My husband asked me to make the check. That is all I know about it.

Q. You don't know whether they were asking you for money or not?

A. No, I don't. I wasn't at the office very often.

Q. How did you happen to select the \$250.

A. He told me to make it out for that amount and that is what I did. He ran the business. I didn't.

(Testimony of Rosalie Brewer.)

Q. Did you tell Mr. Hilts at that time you wished it were was more? A. I don't recall.

Q. Were relations friendly at the time *between* and Paramount Pest Control Service, at the time that check was drawn?

A. I believe so.

Q. As a matter of fact, they continued friendly down to the 24th of July, didn't they?

A. The 24th of July?

Q. Yes. [387]

A. Yes, we were always friendly.

Q. They weren't friendly after Mr. Brewer terminated his agreement?

A. No, they have not been.

Q. But you don't recall whether or not you advised Mr. Hilts that you were not pleased about this \$250? A. I don't remember, sir.

Q. Let me hand you this letter. Your name is Rosalie, is it not? A. Yes, it is.

Q. I hand you this and ask you if that is a copy of your letter? A. Yes, it is.

Mr. Rankin: We offer it in evidence.

Mr. Bernard: May I see it? No objection.

The Court: Admitted.

(Copy of letter dated 2/6/47 "From Rosalie to Harold" thereupon received in evidence and marked Plaintiff's Exhibit No. 81.)

Q. (By Mr. Rankin): This is the letter by which you sent the check? A. Is it?

Q. I am asking you.

(Testimony of Rosalie Brewer.)

A. I don't know whether it is or not. If it is dated the same date the check is dated—— [388]

Q. The letter reads as follows—It is dated February 6, 1947.

A. Was that the date the check was dated?

Q. That is right.

A. Then it accompanied.

Q. It reads: "From Rosalie; to Harold." Who is Harold? A. Harold Hilts.

Q. "Am sending \$250 on the franchise. Best I can do today. There will be more when we can spare it without putting ourselves in a hole. I wish it was more but no can do.

"Charlie is in Salem. Boy, John sure is giving us the works. Most every account we have in that territory has been neglected for months and are the cancellations coming in fast and furiously. John is telling all the customers which he has kept happy some that we are going bankrupt and he is taking over that territory. Charles and Ray are both in there today and fighting it. It's like starting all over again."

You sent that letter? A. Yes, I did.

Mr. Rankin: That is all.

Redirect Examination

By Mr. Bernard:

Q. Who is this "John" that is mentioned as "giving us the works"?

A. It is a former Paramount employee that was here before [389] my husband came up here.

(Testimony of Rosalie Brewer.)

Q. Do you know what he was mad about?

A. Yes, I do. He was promised the manager-ship of Oregon before my husband came here and didn't get it.

Q. And he was mad about that?

A. Yes, he was.

Q. He was out there in the territory taking business away from Paramount? A. He was.

Mr. Bernard: I think that is all.

Mr. Rankin: That is all.

(Witness excused.) [390]

CHARLES P. BREWER

one of the defendants herein, having been previously duly sworn, was recalled and was examined and testified as follows:

Direct Examination

By Mr. Bernard:

Q. As far as possible, I want to avoid covering matters that you testified to previously and, unless the question calls for it, please do not cover the same ground.

It appears from the testimony of Mr. Conger that you started ordering cards and blanks and things of that kind about July 7th. Was that before or after you had been informed that Paramount Pest Control Service desired to go back on the 20-80 basis as of the 1st of July?

A. That was afterwards.

(Testimony of Charles P. Brewer.)

Q. Why did you start ordering these articles at that time?

A. Well, I had already told Mr. Sibert that I was going to break, but, in my exact words, I would carry the business through the month of July, and that is all, and I figured that at any time he might break in here with ten or twelve men and start to grab, and, if he did, I was going to have some printing handy. On July 9th, when Harold was up here to audit the books, he pulled the first audit or balance sheet, as you might call it, showing me somewhere around \$3,900 owing Paramount.

The Court: That has all been covered. [391]

Mr. Bernard: I don't care about that.

Q. Have you got in the courtroom here an empty can containing this 1080 that you purchased from the U. S. Fish and Wild Life?

A. I have.

Q. Is this the can in this bag?

A. That is one of them.

Q. In what shape did the can come to you that you purchased from Paramount Pest Control Service?

A. Well, they were the same sized cans, identical with that, except that they had the Paramount labels.

Q. What did the Paramount label look like?

A. That is a long label. In the exhibits I believe they have somewhere around three of them in there. They are red, more of a red label.

(Testimony of Charles P. Brewer.)

Q. I notice that this label is scratched a little bit. How did that happen? A. I did that.

Q. When?

A. When I emptied the can. The can is quite empty with the exception of a little bit of residue that has not been washed out thoroughly. Any time I empty one of these cans, I invariably scratch the label to tear it apart and try to get it off of there, and then get rid of it so it cannot contaminate anything and nobody can pick it up and come in contact with any of the poison. [392]

Q. Was there a Paramount label ever on this can? A. No, there never was one.

Q. Mr. Hilts has testified about the amount of money that was in the bank in Portland, the bank account in Portland. Who opened that bank account?

A. I opened that bank account with money from my savings. I opened it up in the First National Bank and shortly thereafter they notified me that Paramount had an assumed name certificate filed, the partnership here in Oregon, and I couldn't have a bank account there unless I filed an assumed name and Mr. Sibert was here right—Oh, it was shortly thereafter. I don't know. I guess it was around the first of May, but I did let the bank account ride, and I went up to the courthouse and got a withdrawal slip and gave it to Mr. Sibert and asked if he would fill it out so I could file an assumed name and have the bank account. He said he would let

(Testimony of Charles P. Brewer.)

me know. I got a letter back that may be along that line. He said that their attorneys said that they still had an interest in this business up here and they would not release the assumed name certificate, so I went down to the bank and talked to them——

Q. I don't care to go into all these details. When you finally opened up the bank account, who could sign checks on it?

A. My wife, I know for sure—I gave her authority at the [393] bank—and myself and no one else.

Q. Was anybody present when you closed that bank account?

A. Mr. Hilts was with me when that bank account was closed on August 2, 1947. I closed the account and Mr. Hilts turned to the man, the minute I said I wanted the account closed, and said, "I want to open an account."

Q. Mr. Wendy Fisher has testified that along about July 30th he had a conversation with you and Mrs. Brewer. He further said that you went to the Roosevelt Hotel and, after dinner, went up to his room and he quotes you as saying that you were quitting and taking all the Paramount employees with you; that they had been collecting all the money they could and if there was a dollar left Paramount could be lucky; and that Paramount would be in no position to take care of their accounts for some months to come.

(Testimony of Charles P. Brewer.)

Will you tell the Court what your recollection is of the conversation in Mr. Wendy Fisher's room that night at the hotel?

A. Why, yes, we had gone out to dinner, and we came back up. We were friendly. We always have been. He had come back down through Washington and when I found out from him that he had not been near California, nor heard from them for a week or so, then I told him that he did not know the news.

I told him I was breaking with Paramount and he said, "What for?" And I told him. [394]

I told him of the different things that had come up, that I was not getting along, and I just gave him a resume of my relations with Paramount and he told me, "Well, Charles, you have just got to protect yourself, that is all there is to it," and—Well, I will leave that out.

I didn't tell him, though, that I was taking all the employees with me. I don't remember saying anything about the bank account because there was no bank account here of Paramount's. It was mine.

Q. Mr. Brooks testified that he was here around August 2nd, went out to your house. Do you recall Mr. Brooks being there?

A. Oh, yes, he came out. Mr. Duncan was staying with us at the time. He was getting ready to go on his vacation.

When I had taken my little girl to California, we had met Mr. Sibert at the airport. Raymond

(Testimony of Charles P. Brewer.)

Rightmire and Carl Duncan had driven me and my daughter to the airport to take the plane, and while we were waiting for the plane to take off Carl Duncan asked Mr. Sibert to have Harold Hilts get his vacation check ready for him, that he wanted to go the first of August to Oklahoma on his summer vacation and that he *was* supposed to be entitled to two weeks' vacation. Mr. Sibert began to hem and haw a little bit and said he wasn't working for Paramount, he was working for me, and Carl Duncan said he wanted that time off from the 1st of August for his summer vacation.

Q. This night on August 2nd, when Brooks came out to your [395] house—That was August 2nd, 1947, he says—you told him you were not going into business.

A. I don't remember whether I told him I was or was not or even mentioned it.

Q. Did you have any idea of telling him after August 1st that you were not going into business? Did you have any idea?

A. I don't remember telling him I was not going into business. I do remember telling him I broke from them.

Q. As a matter of fact, you were in that business by that time, weren't you? A. Yes.

Q. Do I understand that this can is in a rather dangerous condition to handle?

A. It is. If everyone is willing, I or someone who is acquainted with it can take the can and dispose of it, but it must be washed out.

(Testimony of Charles P. Brewer.)

Mr. Bernard: I am not offering it in evidence unless counsel desires. It is here if anybody wants it.

Mr. Rankin: We do not want it.

Q. (By Mr. Bernard): Did anybody audit your books every month?

A. Mr. Hilts audited them most every month.

Q. I am turning to Exhibit 51 which they say consists of checks regarding which there is no supporting data, totaling \$925.99, charged to you. Have you examined this exhibit?

A. Yes, I have. [396]

Q. Were any of those items drawn by you personally, or for you personally?

A. They were drawn—Some of them were drawn for me for expenses and things like that; drawn to me, yes.

Q. They were drawn to you? A. Yes.

Q. Was any of the money expended by you otherwise than for business? A. No.

Q. I see these checks start a way back in September, 1946. At the time that Mr. Hilts would make his audit, would those checks appear?

A. Yes, had they come from the books.

Q. The books would show what items of expense those checks were for? A. They do.

Q. Did Mr. Hilts audit the books each month?

A. He did.

Q. Did he ever raise any question about those books when he would make his monthly audit?

(Testimony of Charles P. Brewer.)

A. If he did not understand one, he would ask me what it was and I would explain it to him what it was, and he accepted it.

Q. Was any attempt made to charge these checks to you personally until after this lawsuit was started? A. None whatsoever. [397]

Q. The books, you say, will show what these checks were for? A. They will.

Q. Mr. Glenn Fisher has testified that down in California, when you first talked with these people, that he furnished you a form of manager's contract and a form of the franchise, and you took them home and studied them for a couple of days and then brought them back. What is the fact as to that?

A. That was not so. I never met Glenn Fisher until after I had been on the job for Paramount and he had come up from Los Angeles to Oakland. I didn't meet him—Pardon me. I did meet him for a few minutes in the office one time just before I hired out, when he had just arrived from New York, I believe it was, and the next time I saw him was when I was working for the company.

Q. Regardless of when you met him, were you ever furnished these two forms of contract in California? A. I was not.

Q. Did you have them home or take them home in California? A. I did not.

Q. Will you examine Exhibit 36 which purports to be a sort of a settlement of accounts for twelve

(Testimony of Charles P. Brewer.)

months from July 1, 1946, to June 30, 1947, and will you examine that and state whether or not that accounting is correct or substantially correct.

A. I think that account is very wrong, and I sat down with Mr. Hilts and talked with him for quite a while about it. [398]

Q. What do you contend is wrong?

A. I contend that it was far too much money due Oakland. They have accounts receivable here; besides, they have half of the bank account here, money that lay in the bank, they have here, besides the accounts receivable.

Q. In other words, you, in that accounting here, are charged with the accounts receivable?

A. I am.

Q. And charged with a part of this bank account? A. Right.

Q. Do you know, in round figures in a general way, what you figure you owed them for the year ending June 30, 1947?

A. I owed them somewhere altogether—it is somewhere between \$2,500 and \$3,000.

Q. In other words, you figured you owed them that for the fiscal year ending June 30, 1947?

A. That is for the thirteen months.

The Court: Does he still owe them?

A. Minus \$1,200 that has been paid.

Mr. Bernard: I was going to get to that.

Q. In other words, you drew out how much for yourself?

(Testimony of Charles P. Brewer.)

A. Besides what I took in and put back, I drew \$2,200.

Q. You drew \$2,200. You still owe them between \$2,000 and \$2,500, which would have left you in the hole?

A. They got \$1,200 and I got \$2,200, and there is around \$3,600 [399] or more due and payable on the books when I left them, and it leaves somewhere around \$1,500 or \$1,600 that there is due off of the due and payables on the books.

Q. Did you attempt, when these books were turned over to you, to try to arrive at the amount that was either owing by Paramount or due to Paramount? A. I did.

Q. From your examination of the books, in the time they were turned over to you here a few days ago, you say you have attempted to arrive at how this account stands between the two of you?

A. I have.

Q. Did you make up a statement for that purpose? A. I did.

Q. Refreshing your recollection with that statement, do you figure at the present date you owe Paramount money or Paramount owes you money?

A. I would say Paramount owes me money.

Q. Would you explain to the Court, now, how you arrive at that conclusion, based on the books?

A. Well, the total business, as I have put it down here—I will concede there may be a mistake some place—is \$22,000—the total business for 1947, \$22,734. The total business in 1946 was \$12,321.70.

(Testimony of Charles P. Brewer.)

In 1946 against \$12,321.70 there is \$11,935.38 expenses, leaving a net profit of \$386.32, which was made out and put on my income tax as a net profit for that year.

That was taken to California and audited down there in 1947, as I have said. The total business in 1947, \$22,734.60; the total expenses for 1947, \$16,737.67 total business, minus \$308 depreciation, which is not the correct figure—I found out since that there is more—\$16,000. Wait a minute.

The total business in 1947 is \$22,734.60. The total expenses, including depreciation, is \$16,737.67, leaving a difference of \$5,996.93 net profit for 1947.

Q. Now, then, how did you arrive at the statement that Paramount was indebted to you?

A. I arrived at that by dividing half of the \$386.32 net profit in 1946, plus the net profit of 1947, which is \$5,996.93. Well, I divided each one of these figures and added the two halves together.

Q. I see.

A. And it shows an approximate amount due Charles P. Brewer of \$1,305.97. There is no place in these books that I can find that shows any accounts receivable at the end of July. The accounts receivable which I have figured out here to the best of my ability, figured around \$3,299 approximately.

Q. Accounts receivable?

A. Accounts receivable on the books when I turned the books over to them. [401]

(Testimony of Charles P. Brewer.)

Q. Has any accounting been made to you of that at all?

A. None to me. There has been an accounting pulled on the books, but I have never seen it.

Q. Who made that accounting?

A. That was made by Sawtell, Goldrainer & Company.

Q. What is the amount that the accounting that they compiled shows you owing?

A. The amount shows \$1,305.97 due me.

Mr. Bernard: You may cross-examine.

Cross-Examination

By Mr. Rankin:

Q. Where did you get these figures?

A. The books.

Q. You took them off yourself?

A. I took them off myself.

Q. You could have done that any time in regard to the accounting that Mr. Hilts made to you in June, could you not? You paid on it, didn't you?

A. Through errors in the books——

Q. Just answer my question. You paid on the accounting, didn't you?

A. I paid on the franchise.

Q. On the franchise? July 1, 1946?

A. I paid on the franchise, as modified. I never paid at any time prior to the modification. [402]

Q. If you made up this audit for yourself, why didn't you make it up early enough and submit us a copy so we could scrutinize it?

A. Because you had the books.

(Testimony of Charles P. Brewer.)

Q. How long did it take you?

A. I saw them three days beginning last Thursday or Friday.

Q. They were given to you immediately after the Court denied an inspection of this audit, weren't they?

A. They were given to me some time around last Thursday or Friday. I don't know the exact date.

Mr. Rankin: We won't argue about that. I think Mr. Bernard will admit they asked for them and they were received immediately after the Court denied an inspection of the audit.

Mr. Bernard: No question about that.

Q. (By Mr. Rankin): You mentioned Mr. Carl Duncan. Where is he?

A. To the best of my knowledge, Mr. Carl Duncan is some place around Bend, Oregon, at the present time.

Q. In your employ? A. He is.

Q. He has been at all times since August 1, 1947?

A. He has not. He has been in my employ since somewhere around August 18th to 20th.

Q. You pay him just like you pay these other men that are hired? A. I do.

Q. Where does he live? [403]

A. Well, that is a hard thing to say. He is traveling twenty-eight days out of the month.

Q. Does he ever come to Portland?

A. He does.

Q. When? A. At the end of the month.

(Testimony of Charles P. Brewer.)

Q. You knew we were looking for him?

A. Yes.

Q. You never advised us when he was in?

A. I never advised you when he was in, but I did tell you where you could contact him in Idaho.

Q. Did you also know we could not serve him in Idaho?

A. I did not. It is the U. S. Marshal—I thought he could serve there.

Q. In the payment of the June accounting, you paid down to \$3,100, didn't you?

A. I gave him that check for \$259.61 with the provision that if this accounting was right, I would pay the balance left.

Q. Why did you make that odd figure, \$259.61?

A. Because I hadn't had a chance yet to study this, and Mr. Hilts assured me himself that it was correct. I said, "I will pay the odd figure," somewhere around \$250, and he broke off the odd figures and took \$259.61.

Q. Did you ever advise them by letter that the accounting was not right? [404]

A. No, never.

Mr. Rankin: That is all.

(Testimony of Charles P. Brewer.)

Redirect Examination

By Mr. Bernard:

Q. May I ask you a couple of questions? You say Mr. Duncan went to work for you the 18th of August.

A. He had been going to go on his vacation and Paramount threw this first lawsuit in the Circuit Court and he was served with papers for that court hearing, and he was going to take in a wedding of one of his relatives down south and when that trial was finally thrown out of court, he could not get there in time for the wedding so he said he might as well stay here.

Q. Had you talked with him at any time prior to that time?

A. No. I told him to go on his vacation.

Q. In this compilation that you have prepared, on the first page you have the number "70." What are those numbers?

A. Those are the page numbers taken from the books.

Q. Then, on the second page I notice after certain items there will be "Expense, No. 70," and "Expense, No. 71." What do they refer to?

A. Those are items of expense listed in the ledger under No. 70 or No. 85, or whatever number it is here.

Mr. Bernard: I would like to offer that compilation in evidence. [405]

Mr. Rankin: We object to that, your Honor, on the ground and for the reason that very early in

(Testimony of Charles P. Brewer.)

these proceedings we asked for a statement from defendants as to these claims. Mr. Leo Smith took the deposition of Mr. Brewer in my absence and in that called for a statement of what these comprise. The answer in that deposition is "We can't make it until we get the books." Then they did not try to get the books, although they were offered them, and they were offered previously and they were offered subsequently, and then, when the motion was made and the Court denied an inspection of the audit, for the first time they accepted the books, and they just brought them back this morning.

Now, to come in at the last minute, when there is no opportunity for us to examine it thoroughly, I submit to your Honor is not proper. Fairness in the trial of a lawsuit would require, as we have done here, the compilation to be put in at the pre-trial and the other side given a little opportunity to check the fairness or accuracy or the integrity of a statement like that.

The Court: Objection sustained.

Mr. Bernard: That is all.

Mr. Rankin: That is all.

(Witness excused.)

Mr. Bernard: That is our case, your Honor.

Mr. Rankin: That is all.

The Court: The testimony is closed, is it?

Mr. Rankin: No rebuttal, your Honor.

The Court: When do you want to be heard?

Mr. Rankin: Whenever it suits the convenience of the Court:

The Court: It makes no difference to me. The record has never been cleaned up as to Duncan. He has not been served.

Mr. Rankin: No.

The Court: He should be dismissed out of the case, I submit.

Mr. Rankin: Yes.

The Court: Dismissed without prejudice.

Mr. Rankin: Yes, if you will.

The Court: Is there any objection to that?

Mr. Bernard: No.

Mr. Rankin: Just a moment, please, your Honor. We have tried our best to serve him. I think the evidence has shown that. I wonder if it would not be possible, since he has not put in an appearance, to have the case continued as to him.

The Court: You cannot break up a case that way.

Mr. Rankin: This is a conspiracy case and I thought possibly that might be done.

The Court: I don't think so.

Mr. Rankin: We will take a nonsuit as to him, without [407] prejudice.

The Court: So ordered. Leave it this way: He is dismissed out on my motion without prejudice. That does not commit you.

Mr. Rankin: Yes, your Honor.

(Thereupon the hearing in the above-entitled cause was continued until Saturday, January 24, 1948, at 10:00 o'clock a.m. for argument of counsel.) [408]

In the District Court of the United States
for the District of Oregon

Civil No. 3936

PARAMOUNT PEST CONTROL SERVICE, a
corporation,

Plaintiff,

vs.

CHARLES P. BREWER, individually and doing
business as Brewer's Pest Control; ROSALIE
BREWER, his wife; RAYMOND RIGHT-
MIRE, CARL DUNCAN, EARL MERRIOTT,
and all other persons associated with said de-
fendants as herein described,

Defendants.

REPORTER'S CERTIFICATE

I, Ira G. Holcomb, a Court reporter of the above
entitled Court, duly appointed and qualified, do
hereby certify that on the 20th, 21st and 23rd days
of January, A.D. 1948, I reported in shorthand the
proceedings of the trial had in the above-entitled
cause, that I subsequently caused my said shorthand
notes to be reduced to typewriting, and that the
foregoing transcript, pages numbered 1 to 408, both
inclusive, constitutes a full, true and accurate tran-
script of said proceedings, so taken by me in short-
hand on said dates as aforesaid, and of the whole
thereof.

Dated this 11th day of March, A.D. 1948.

/s/ IRA G. HOLCOMB,

Court Reporter. [409]

In the District Court of the United States
for the District of Oregon

Civil No. 3936

PARAMOUNT PEST CONTROL SERVICE, a
corporation,

Plaintiff,

vs.

CHARLES P. BREWER, et al.,

Defendants.

DEPOSITION OF CHARLES P. BREWER
DEFENDANT

Taken as an adverse party on behalf of Plaintiff.

Be It Remembered that, pursuant to the oral stipulation hereinafter set out, the deposition of Charles P. Brewer was taken on behalf of the plaintiff before Ira G. Holcomb, a Notary Public for Oregon, residing in Portland, on the 7th day of January, A.D. 1948, beginning at 1:30 o'clock p.m., at Room 503, United States Court House, in the City of Portland, County of Multnomah and State of Oregon.

Appearances:

Mr. F. Leo Smith and Mr. George E. Birnie, of
Attorneys for Plaintiff.

Mr. E. F. Bernard and Mr. Plowden Stott, of
Attorneys for Defendants.

Stipulation

(It is stipulated and agreed by and between the attorneys for the respective parties that the deposi-

tion of the above-named defendant may be taken on behalf of the plaintiff as an adverse party, at Room 503, United States Court House, in the City of Portland, County of Multnomah, State of Oregon, on Wednesday, the 7th day of January, A.D. 1948, beginning at 1:30 o'clock p.m., before Ira G. Holcomb, a Notary Public for Oregon.

(It is further stipulated that the deposition, when transcribed, may be used on the trial of said cause as by law provided; that all questions as to the notice of the time and place of taking the same are waived; and that all objections as to the form of the questions are waived unless objected to at the time the questions are asked; and that all objections as to materiality, relevancy and competency of the testimony are reserved to the parties until the time of trial.

(It is further stipulated by the attorneys for the respective parties that the reading over of the testimony to or by the witness and the signing thereof are expressly waived.) [2*]

Mr. Bernard: You understand, Mr. Brewer, that, after your testimony has been transcribed by the Court Reporter, you have the privilege of reading it over and signing your deposition; or you may waive that.

Mr. Brewer: Let it go as it is. I will waive signing it.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

CHARLES P. BREWER

one of the defendants herein, produced as an adverse party on behalf of the plaintiff, having been first duly sworn to testify the truth, the whole truth and nothing but the truth, was examined and testified as follows:

Direct Examination

By Mr. Smith:

Q. Mr. Brewer, according to the pleadings, I believe it is true that you acknowledge signing the sales agent agreement with Paramount Pest Control Service?

A. I signed the franchise, as I understand it.

Q. Did you consider that as a binding and valid contract?

A. At the time it was signed.

Q. Did the time ever come when you did not consider it as a valid and binding contract?

A. After they had refused to live up to it, I couldn't see where it was worth anything.

Q. What date was that?

A. That was shortly after the first of the year, 1947; was along about, oh, between the first of February and March. [3]

Q. Some time along the first of February or March, you considered that the contract was no longer binding?

A. It had not been lived up to at that time.

Q. But, prior to that time, you did acknowledge it as a binding contract?

A. Prior to then, yes.

(Deposition of Charles P. Brewer.)

Q. Is there any reason, other than your contention that they did not live up to it—Is there any other reason why you did not consider it a binding contract?

A. Other than that they did not live up to it and according to the way it was amended, shall we say, amended verbally.

Q. I think “modified” is the better word.

A. Or modified. That is a better word, yes.

Q. But, other than that, you considered it a binding contract?

A. It would have been had they lived up to it. I don’t understand just what you are asking, there.

Mr. Stott: If you do not understand a question, I think you have the right to ask him to explain any part of the question you do not understand.

Q. (By Mr. Smith): What part don’t you understand?

A. I don’t understand what you mean by did I consider it a binding contract. It was a contract—It was acknowledged by both of us—and as long as they live up to it—When they refused to live up to it, I couldn’t see that it was any more binding. [4]

Q. When did you first notify them that you did not consider it as a binding contract?

A. I didn’t notify them in those exact words.

Q. What words did you use?

A. I notified them I would no longer be connected with them if they did not live up to it.

Q. When did you notify them of that?

(Deposition of Charles P. Brewer.)

A. I notified them of that in February or March the first time, again in April and in June.

Q. Was that notification in writing?

A. That was verbal.

Q. When was the first time you made any written notification to that effect?

A. About July 24th I wrote them a confirmation of my breaking from them, I think somewhere around the 24th of July.

Q. Will you identify those occasions as to when you orally notified the company that you were terminating the contract unless they lived up to its terms?

A. During the times when Mr. Harold Hilts was here in Portland, balancing the books, checking the books.

Q. Will you state those dates as nearly as you can?

A. I wouldn't know without checking the records as to what dates it was, no. All I can say is some time around the first of March and some time around the first of April and again the latter part of June.

Q. On those occasions was there anyone present besides yourself and Mr. Hilts?

A. My wife was present in February and I don't know for sure whether she was there in April but she was there again in June.

Q. When you say that the company was not living up to its terms, will you state that fully and completely and in detail just what you mean?

(Deposition of Charles P. Brewer.)

A. They are trying to get me to pay them 20 per cent on gross after it had been modified.

Q. That is your full and complete explanation?

A. That was the reason why.

Q. That is the only reason why?

A. That is why.

Q. That is the only reason?

A. That is the only reason why.

Q. When this contract was originally signed, you worked under it according to its terms for how long?

Mr. Bernard: May I ask you to qualify the question? Do you mean "worked under it" unmodified?

Mr. Smith: Yes.

Mr. Bernard: I see.

A. I worked under it until the end of—until Thanksgiving, 1946.

Q. (By Mr. Smith): Then, would you tell the story leading up to its modification? [6]

A. The company had been in the red when I took it over, much to my disgust, and not wanting it, and I carried it myself with the understanding that there would be no payments asked for on the business until it was out of the red and they came through. Mr. Hilts checked the books and kept handing me statements showing how much it was costing me and how it was running in the red, as it was, and, when I saw, even with that growth, it was going to break me and not pay anything at all—so, near the end of November, my wife and I drove to

(Deposition of Charles P. Brewer.)

California and I went to the office of the corporation. I told them I could not carry the business any longer under the conditions it was in. I couldn't financially handle it.

Q. You say you told them. Who?

A. I told T. C. Sibert, the president, and he said he would modify it to make it 50 per cent on net profit if I would carry on. I said, "All right, under that agreement, I can carry on." He asked me then, "Do you want this until the first of the year or do you want it for a year or two, or how do you want it? It is up to you.

I said, "I want it for the life of the contract, as long as we are operating," and he said, "All right. That is the way it will be."

Q. I will ask you if he said that, "When you take a dollar out of the business I will take a dollar out of the business?"

A. He said the words, "When you take home a dollar I take home [7] dollar."

Q. That was the understanding?

A. That was one of the remarks he made, yes. It was understood to be 50 per cent on net profits, because I had to live, regardless.

Q. Was it not finally agreed between you and Ted Sibert that when you took a dollar out of the business he would take a dollar out of the business?

A. Not in that exact category, no. It was understood to be 50 per cent on net profits, equally. I couldn't pay him dollar for dollar because the busi-

(Deposition of Charles P. Brewer.)

ness was in the red and I was living out of my personal income as it was.

Q. Was there anybody besides you and Mr. Sibert present when this modification was made?

A. There were several of the company in and out of the office. He and I were talking more or less personally. His secretary was there, not recording the conversation, though.

Q. Who would you say was present who could have heard the conversation?

A. The conversation, as such, was not exactly heard in its entirety by anyone except at the end of the conversation, Glenn Fisher came in, also Harold Hilts, and Ted Sibert told them that he had just reached an agreement with me—that I could not carry on the way it was, and that we had reached an agreement where we would split the net profits.

Q. Ted Sibert said that in the presence of Glenn Fisher and Harold Hilts? A. Right.

Q. And yourself? A. Right.

Q. And you four were the only ones present?

A. Yes.

Q. Your wife was not present?

A. Not at that particular time that I remember. She could have been, but I would hate to make that too emphatic because I do not remember the exact circumstances.

Q. Was anyone present besides yourself when Mr. Sibert agreed that the duration of this fifty-fifty division of net profits should be continuous and not limited to the first of the year?

(Deposition of Charles P. Brewer.)

A. He told that to Mr. Fisher and Hilts. They were not there when it was agreed upon, though.

Q. You did run along on this contract with the modification until the first of the year?

A. Yes.

Q. Up until that time you had no difficulty as far as your remittances to the company were concerned and your understanding with the company?

A. It was only one month practically and there were no remittances paid.

Q. It was not retroactive to the first of July?

A. Was retroactive to the beginning of the franchise.

Q. So, then, it covered a period of from July 1st on? A. Right.

Q. When did someone from the company tell you that that modification agreement was effective only until the first of the year?

A. Harold Hilts presented me with a statement of what I was supposed to owe the company, some time around the end of February or the first of March, and the statement showed 20 per cent gross business——

Q. Pardon me. You mean 20 per cent of the gross business subsequent to the first of the year?

A. Subsequent from July 1st, from the 1st of July on up.

Q. From the 1st of July on up? A. Yes.

Q. In other words, that statement did not recognize that modification agreement at all?

(Deposition of Charles P. Brewer.)

A. None whatsoever. He presented me with that statement. I had sent them \$500, or close to it. I gave them a check for a balance of four hundred and some odd dollars, and told him after handing him the check—I drove to the airport and told him I was completely done with the whole——

Q. You are traveling a little too fast for me there. Let's go back to this statement that Mr. Hilts presented to you in the latter part of February or the first part of March.

You say that was the first time when anyone from the [10] Paramount Pest Control Service indicated that the fifty-fifty agreement was not going to be lived up to by the company?

A. That is the first, from the corporation, from the time I talked with Sibert. They had not come to balance the books during January.

Q. When Hilts presented you with such a statement and you had a chance to look it over and to analyze it, what did you say to him?

A. I did not look it over or analyze it. I only glanced at it enough to see they were wanting me to pay them 20 per cent. I turned to my wife and told her to make them out a check for the exact amount of dollars necessary, and handed it to him and told him I was done.

Q. When you say you were done, that was at this meeting the latter part of February or the first of March?

A. Yes.

Q. You told your wife to write out a check?

A. Right.

(Deposition of Charles P. Brewer.)

Q. What was the amount of that check?

A. Four hundred and some-odd dollars.

Q. How did you arrive at the amount of that check?

A. His statement showed me owing them nine hundred some dollars and I had already given them \$500, and I gave him the balance and told him I was done.

Q. So, then, you did pay the balance owing, according to his [11] statement?

A. According to the statement, which I knew at the time was not correct.

Q. Even though you knew it was not correct, you wrote out a check for that amount and handed it to Hilts?

A. I did.

Q. You did not stop payment on that check?

A. I did not.

Q. And you say that you told Hilts you were done, that you were through?

A. I was through, yes.

Q. But you did not give him any written notice?

A. I did not.

Q. Did you continue to work for the company?

A. I continued in this respect—that was Friday evening, and I would have given them time enough to get someone to take my place.

Q. Yes.

A. And Sunday morning at 9:00 o'clock I received a special delivery letter from Hilts, apologizing and stating that it was supposed to be a fifty-fifty proposition.

(Deposition of Charles P. Brewer.)

Q. Yes. So, when you received that letter, what did you do? A. I continued operating.

Q. Then did you have an adjustment?

A. No. You couldn't adjust anything. I never could understand [12] their figures fast enough to adjust them.

Q. After you received the letter—you received it Sunday morning, is that right? A. Right.

Q. That was around the first part of March?

A. Right.

Q. You continued to work for the company, did you?

A. I continued to work for myself, under that name.

Q. Under this franchise agreement?

A. Yes.

Q. As modified? A. Right.

Q. When is the next time you had any difficulty with Mr. Hilts regarding remittances?

A. That was some time the first part of April.

Q. About a month later?

A. Somewhere around that.

Q. Tell us, if you will, please, the full background and everything that led up to your disagreement with Hilts around the first of April?

A. The first of April he came through to check the books again and presented me with a statement and asked for money. I told him I was not, at that exact time, able to pay it and he said, well, he had to have it.

(Deposition of Charles P. Brewer.)

I told him I could not pay it to him and he said there [13] had to be some arrangement where I could borrow money or something. I told him according to my agreement with the Paramount Corporation I would not have to pay them any money until the business was on its feet and that, if they were going to demand money, if it meant my running into debt to pay them something, I would get rid of it, and he immediately told me, then, they were not wanting me to dump it and get out of it in any way, that they wanted me to hang on and that they would not press payment.

Q. Did you pay Hilts any money at that time?

A. No.

Q. What I meant to say was: Did you give him a check? A. No

Q Payable to the Paramount Pest Control Service? A. No, I didn't.

Q. Did you tell Hilts that you were going on, then?

A. I told him I would dump it if they tried to force payment on me, get me into debt.

Q. What did he say?

A. He said they would not force payment in that case.

Q. Then, was there any other conversation between you and him at that time pertaining—

A. Not pertaining to that.

Q. Pertaining to keeping the franchise or not?

A. No. [14]

(Deposition of Charles P. Brewer.)

Q. When is the next time that you and Hilts came together to make an accounting?

A. I think it was some time in June.

Q. So, between April 1st and June, you and Hilts never got together regarding any accounting?

A. We never saw each other. I was out of town.

Q. During all these times the dealings were with you and Hilts? You never had any agent representing you, did you?

A. I never had any agent representing me?

Q. Like your wife? A. No.

Q. It was you who would carry on your own business? A. Right.

Q. Fine. About when was it in June, Mr. Brewer, that you and Mr. Hilts came together again for an accounting?

A. The latter part—I don't know the exact date; some time, I would say after the 24th.

Q. Tell us, if you will, please, the full and complete story in detail of what took place.

A. He told me—he presented me with another statement from the books, showing moneys that I did not believe I owed. We argued over moneys due them for supplies and some equipment that I had taken over from them and, after arguing around all day, he presented me with a statement, showing me owing them somewhere around \$3,000. [15]

I told him I did not understand it as that and I did not believe it was right. He said, well, he was in a spot himself and wanted some money to take

(Deposition of Charles P. Brewer.)

back with him and asked if I would give him a few dollars, some kind of a token payment. I told him— He said it was correct, as far as he could see. I told him, well, I couldn't see it. I did not have time to check it, but I would give him a check. I gave him a check for \$200, two hundred some dollars. If the statement had been correct, it would have cut off the tail end of it, two hundred and some-odd dollars.

Q. So you did make out a check in odd figures as a payment on that statement which he submitted to you?

A. As a payment on moneys due them.

Q. And that left a balance in round figures?

A. Yes.

Q. And that was on June 24th?

A. Somewhere around the latter part of June, between the 25th and the 1st of July.

Q. So, when Mr. Hilts left you that date, he took a check with him?

A. Yes, I think he did.

Q. And that check was drawn on a Portland bank? A. Yes.

Q. And you never stopped payment on that check? A. No. [16]

Q. Did you ever at any time write any letters to the Paramount Pest Control wherein you denied that particular accounting that was had between you and Mr. Hilts? A. No.

Q. When did you send them a notification in writing of your termination?

(Deposition of Charles P. Brewer.)

A. At the end of July. That was a confirmation of the verbal.

Q. I beg your pardon?

A. That was the confirmation.

Q. What was the verbal language then?

A. I told Hilts according to their figures, according to the way they were going—would not live up to their contract—I was quitting Paramount and getting away from it.

Q. When did you tell him that?

A. I told him that the first part of—it was either the very end of June or the first part of July.

Q. Was that after you had paid him the money?

A. That was right around the time I paid him the money. He was here twice. I can't recall which time.

Q. Was there anybody present besides you and Mr. Hilts when this conversation went on?

A. I don't know whether there was or not.

Q. As to the moneys owing either you or the company, by one or the other, what would you say was the amount that either one of you owed to the other at this time? [17] A. At this time?

Mr. Bernard: May I interrupt here just a moment? We have served a notice to produce the audit made by Goldrainer & Sawtell or Sawtell, Goldrainer & Company—whatever it is—have you got that with you?

Mr. Smith: I do not have that with me, but I think it can be obtained. I think it is in Mr. Ran-

(Deposition of Charles P. Brewer.)

kin's file. The reason that we did not produce it is that we do not think we are required to produce it. If the Court orders us to produce it, we will be glad to produce it.

Mr. Bernard: Well, I want to say to the witness that if he needs any documentary evidence in order to answer the question intelligently, he is entitled to have it.

Mr. Smith: Well, I will put the question to the witness and then we will let him answer it.

Mr. Stott: Mr. Brewer, did you understand what Mr. Bernard said.

A. Will you repeat the question?

Mr. Stott: Repeat the question. Read the question, Mr. Reporter.

(Question read.)

A. I can't say the exact amount because of not having the audit.

Q. (By Mr. Smith): To the best of your knowledge, what do you believe the amount to be?

A. I don't know. I would hate to say unless I had the audit [18] and inventory of equipment turned over to them.

Q. Are you contending that the company owes you any money? A. I am.

Q. How much are you contending that they owe to you?

A. I don't know any particular figures except I believe the audit will show around \$2,000.

(Deposition of Charles P. Brewer.)

Q. Have you at any time stated what you believe the company owes you?

A. They won't talk to me. They won't even get on the phone.

Q. I asked you if you have ever stated——

A. I cannot.

Q. You have not stated it? A. No.

Q. Do you deny that you owe any money to the company? A. As a final settlement, yes.

Q. Did you at any time make a claim for \$700 by reason of your performance of the contract as modified? A. I cannot contact any of them.

Q. You have not answered the question.

A. I tried to.

Mr. Stott: Read it.

(Question read.)

A. Not to them.

Q. (By Mr. Smith): Did you make it through your attorneys? A. In an affidavit. [19]

Q. In an affidavit?

A. Yes, or answer, I would say.

Q. So, in your pleadings you do contend that the company is indebted to you in the sum of \$700 by reason of your performance of the contract as modified? A. I imagine I did.

Q. You also contend that the reasonable value of the supplies and equipment belonging to yourself and turned over by you to the plaintiff is the reasonable amount of \$1,350?

(Deposition of Charles P. Brewer.)

A. That is as far as I can say, without the inventory that we took at that time.

Mr. Smith: At this time I want to advise you that I do have the books of the company, the books that Mr. Brewer kept, and they are available to you if you want them. You can also take them providing—they will be given to you as an attorney.

Mr. Bernard: The books from which this Sawtell, Goldrainer & Company audit was made?

Mr. Smith: Yes. Do you want these books?

Mr. Bernard: I want the audit.

Mr. Smith: Do you want the books?

Mr. Bernard: No, I don't want the books now. I may want them later. If I do, I will ask for them.

Mr. Smith: I wanted to make the offer and wanted it to be in the record that I did offer you the books at this time.

Q. Mr. Brewer, do you recall giving to the Paramount Pest Control [20] Service, on February 6, 1947, a check for \$338?

A. I don't recall the figures or why that was given.

Mr. Bernard: At the pre-trial hearing the Court permitted these exhibits to be marked with the understanding that we would be permitted an inspection of them. When will you be through with them so that we can have them?

Mr. Smith: Any time now.

Mr. Bernard: All right.

(Deposition of Charles P. Brewer.)

Q. (By Mr. Smith): This check dated February 6th in the sum of \$338, signed by Rosalie Brewer, that is the check I am referring to. Did you cause that check to be made out and given to the Paramount Pest Control Service?

A. I am responsible for it.

Q. That is right.

A. That is all I can say. I don't recall—I can understand it now.

Q. So, you did give that check to Mr. Hilts at that time? A. No, it was mailed to them.

Q. And this is the statement which you prepared along with it? A. Yes, that is the statement.

Q. Is there any explanation you want to make of it at this time?

A. \$250 of that was half of the \$500 I had paid them before Hilts and I tangled the first of March.

Q. So, then, you did recognize the franchise agreement up until that time? [21]

A. I always recognized it as modified. This was to apply on moneys due to them.

Q. Then, is it your contention that this check (Plaintiff's Pre-Trial Exhibit No. 30) which you gave them, for \$338—what was that payment for?

A. That was for Invoice No. 2733, Invoice No. 2776 and Invoice No. 2707 and \$250 to apply to the franchise.

Q. This \$250 to apply to the franchise, was that on a fifty-fifty basis or a 20 per cent basis?

A. That was the fifty-fifty basis.

(Deposition of Charles P. Brewer.)

Q. That check is Exhibit No. 30, isn't it?

A. Yes.

Q. And the memorandum that we are speaking of is Exhibit No. 31? A. Yes.

Q. Now, I will ask you, Mr. Brewer, if this is your signature on this check dated March 6, 1947?

A. It is.

Q. We are speaking of Exhibit No. 30?

A. Right.

Q. That is a check for \$250 to the Paramount Pest Control Service? A. Right.

Q. And that is to apply on the 1946 franchise?

A. Right.

Q. Is that \$250 calculated on a fifty-fifty basis or a 20 per cent [22] basis?

A. On a fifty-fifty basis.

Q. I show you a check dated March 13, 1947, being Exhibit No. 34. That check is signed by you, is it not? A. It is.

Q. Payable to the Paramount Pest Control Service? A. Yes.

Q. In amount \$494.25? A. Right.

Q. Is that correct? A. Yes, sir.

Q. I notice on the memorandum, Exhibit No. 35, which accompanied it, that you have here listed "Franchise Bal. for January and February," and that franchise balance is \$494.25. That is the correct amount, is it not?

A. That is what that covers, yes.

Q. You made up those figures, didn't you?

A. No, I didn't.

(Deposition of Charles P. Brewer.)

Q. You recognized those figures to be correct, didn't you?

A. I recognized that is what blew up the bandwagon with Paramount and myself.

Q. But that was the amount which Mr. Hilts submitted to you?

A. That is the amount he submitted.

Q. And, in turn, you wrote out a check for \$494.25? A. I did. [23]

Q. And that was the odd figure that would leave a balance of \$500?

A. That \$500 had been paid.

Q. That is correct. Thank you for the correction. Then, that would pay it in full?

A. That paid that statement in full, yes.

Q. This franchise, how is that figured, on what basis?

A. That is these other two checks of \$250 — fifty-fifty net profits.

Q. Is the franchise for January and February computed on a fifty-fifty basis or on a 20 per cent basis?

A. That statement was handed to me as a 20 per cent.

Q. Yes.

A. And I would not accept it. I did pay the \$494.25 only because I knew that I owed them at least \$494.

Q. But this is the statement and it was computed on a 20 per cent basis? A. It was.

(Deposition of Charles P. Brewer.)

Q. You were told by Mr. Hilts at that time that the amount owing on the franchise was \$994.25, and that it was computed on a 20 per cent basis?

A. He told me that and I told him I was through with him.

Q. But, nevertheless, you did pay him the sum of \$494.25 on that statement? A. I did. [24]

Q. At that time did Mr. Hilts show you these figures which are represented by Exhibit No. 36?

A. I don't know.

Q. I will ask you whether or not this is in your handwriting, Exhibit No. 36?

A. That is in my handwriting, yes.

Q. And on that document which I refer to as being in your handwriting, Mr. Brewer, is written "July 9, 1947, paid Check No. 413, \$259.61." That is your handwriting?

A. That is my handwriting, yes.

Q. You knew what you were writing when you wrote it? A. I knew what I was writing.

Q. What? A. I did.

Q. I will ask you, Mr. Brewer, if that does not represent a computation made at that time by Mr. Hilts on the 20 per cent basis?

A. I don't know whether it is 20 per cent or not.

Q. That is what you understood at the time?

Mr. Stott: What are you referring to, that exhibit?

Mr. Bernard: That exhibit, No. 36.

Q. (By Mr. Smith): Will you answer the question? A. I can't answer that question.

(Deposition of Charles P. Brewer.)

Q. When you paid this check for \$259.61 that was a payment on a balance owing to the company as represented by Mr. Hilts, is [25] that right?

A. That is the check I gave them to knock off the end and leave an even figure only, which I did not have a chance to study nor understand at the time.

Q. So, then, it is your contention that when you paid him this check for \$259.61 you did not have any opportunity to go over the figures?

A. I hadn't.

Q. Why didn't you?

A. Because I was in and out of town, and he pulled a balance of the books and handed me a statement showing what I owed him. If it looked right to me as I understood the books, there wasn't too much argument; if it did not look right to me, there was an argument.

Q. Did this look right to you?

A. It didn't look right to me.

Q. Then why did you pay it?

A. I gave it to him only because he wanted to take home some money.

Q. You never wrote any letter confirming that, did you? A. No.

Q. You haven't anything in writing confirming that?

A. I only told him that I would carry it during the month of July and I was done with it.

Q. Was anybody present when you told him that? [26]

(Deposition of Charles P. Brewer.)

A. I don't recall whether there was or not.

Q. Mr. Brewer, who kept the books of the Paramount Pest Control Service? A. I did.

Q. When you say you kept the books, you mean you made all of the entries yourself? A. No.

Q. The entries were made either by you or your wife? A. Most of them were.

Q. Who else made entries?

A. Harold Hilts.

Q. Who? A. Harold Hilts.

Q. Did he make any wrongful entries in the books? A. Not to my knowledge.

Q. All of the entries which were made by your wife were made under your direction and supervision? A. Right.

Q. So you do admit responsibility of keeping those books? A. I do.

Q. Are those books correct?

A. To the best of our ability.

Q. And they are understandable by you?

A. They are.

Q. At any time, did you ever have an audit made of those books? [27]

A. Not by a certified public accountant.

Q. Who did you have audit them?

A. There was no complete audit ever pulled on them.

Q. What partial audit was made?

A. Harold Hilts was supposed to have pulled an audit somewhere around the first of March for income tax purposes.

(Deposition of Charles P. Brewer.)

Q. Was there any person, other than Harold Hilts, that ever made a partial or complete audit of the books? A. Not of the books, no.

Q. Well, of your accounts, then? A. No.

Q. Did you ever have any bookkeeping service that would check your books and your accounts?

A. No.

Q. Or any accounting service of any kind?

A. No.

Q. So, the only accountants who ever worked on the books, that is, to your knowledge, were you and your wife and Mr. Hilts?

A. Until I left them, yes. I will take that back. The books were set up by a bookkeeper for Paramount Pest Control Service, Mrs. Jacobs. She worked for the first or second month, some time around the first of July or August, something like that.

Q. Mr. Brewer, the only written notice that you ever gave to the company of the termination of this franchise was your letter of July 24th, correct? [28]

A. The only written——

Q. Is that right? A. That is right.

Q. You had a copy of your sales agent's agreement with the Paramount Pest Control Service?

A. I had.

Q. And do you recognize that it has a provision in there as to how the agreement should be terminated? A. It does.

(Deposition of Charles P. Brewer.)

Q. And, at the time you sent this notice out, you were acquainted with the provision which required that the agreement could be canceled by either party on ninety days' written notice?

A. I was acquainted with it.

Q. Why did you not abide by that provision?

A. Because they would have broke me if I had.

Q. What do you mean by saying they would have broke you if you did that?

A. They would have tried to grab my books, equipment and supplies, if I tried to stay with them ninety days.

Q. Is that the only reason?

A. I notified them that I would not continue with them beyond the month of July and I wrote them a letter confirming that.

Q. When you say you wrote them a letter confirming that, that is the letter of July 24th?

A. It is. [29]

Q. When you asked them to accept your resignation as of August 1st? A. Right.

Q. The reason that you did not give them ninety days' notice is that, if you had, they would have broken you? A. Right.

Q. That is the only reason you did not give them the ninety days' notice? A. Right.

Q. Mr. Brewer, after you ceased working under this franchise agreement, what did you do? Did you go into the pest control service?

A. I went into business for myself under my own name.

(Deposition of Charles P. Brewer.)

Q. You say that you went into business for yourself under your own name. Is it not a fact, Mr. Brewer, that you first went into business under the name of Rosalie Brewer?

A. Yes. She signed the assumed name certificate. She is my wife.

Q. Yes, and that, in truth and in fact, was just a dummy organization, as far as she was concerned?

A. No. She owns half of my business, regardless.

Q. The first business that you went into, that was called what? A. Brewer's Pest Control.

Q. Who filed the assumed business name certificate? A. My wife. [30]

Q. Did that certificate show you as having an interest in the business? A. No.

Q. So you did not have a half interest in the business? A. My wife and I owned it.

Q. But the original certificate which was on file did not show you as a part owner? A. No.

Q. After that Mr. Brewer, did you have your wife withdraw that assumed business name certificate? A. Yes, she withdrew it.

Q. And, simultaneously, did you file a new assumed business name certificate? A. I did.

Q. In that new certificate what did that show regarding who was the owner of Brewer's Pest Control Service? A. Showed myself as the owner.

Q. Does it show your wife as a part owner?

A. No.

Q. Is she or is she not a part owner?

(Deposition of Charles P. Brewer.)

A. There is a community property law in Oregon. She owns half of anything that is mine.

Q. Is that the only way that she has any interest in it, by virtue of the community property law?

A. Well, and being my wife, yes. [31]

Q. But she did not invest any money in it?

A. Our money was invested.

Q. Why was it, when you first went into business, you did not use your own name?

A. I was too busy working Paramount business. I didn't want to take the time off to go up and file it.

Q. When was that filed? A. I don't remember.

Q. Is it not a fact it was filed on or about July 30th? A. On or about there, yes.

Q. Yes, and, to the best of your knowledge, it was July 30th? A. I suppose it was.

Q. You say the only reason that you had it filed in her name was that you were too busy to do it yourself? A. I was working as Paramount.

Q. Yes.

A. I did not feel like going up and filing any assumed name certificate under the name of Brewer.

Q. Why?

A. I was busy and I was still with the Paramount.

Q. Was it for both of those reasons?

A. I was busy.

Q. Then, the fact you were still working for Paramount did not make any difference?

A. Made a lot of difference. [32]

(Deposition of Charles P. Brewer.)

Q. Well, I want you to tell the whole story. Just don't answer one question halfway. Tell us why it is that you had her fill out the assumed business name certificate instead of you having it filled out yourself. Tell us the whole story.

A. She could go out without interfering with Paramount business. I could not.

Q. What do you mean by that?

A. Well, I was working in the interest of the company named Paramount Pest Control Service.

Q. In other words, you felt you would be violating your franchise?

A. No. I felt I would be violating my own personal interests if I would take time off from Paramount business to go and file an assumed name certificate.

Q. In other words, you felt you owed all your time to the Paramount interests? A. I did.

Q. And, being scrupulous about that, you did not even want to take time off to go up to the Court House to file this certificate? A. Right.

Q. Is it not a fact that you could have just signed your name to the certificate and sent somebody up to the Court House to file it for you?

A. Someone had to go up and get it.

Q. But the only reason that you put it in her name was that you did not want to take the time to go to the Court House, but you [33] wanted to devote all your time to the Paramount Pest Control Service? A. That is right.

(Deposition of Charles P. Brewer.)

Q. Mr. Brewer, this assumed name of Brewer's Pest Control, when did you commence to work for it? A. August 1st.

Q. So you did work for your wife?

A. We own it together.

Q. So, since August 1st, you have been working for Brewer's Pest Control, originally filed by Rosalie Brewer and then subsequently filed by you?

A. Right.

Q. And continuously all the time, right up to the present moment? A. Right.

Q. When did you first get the idea that you would go into business for yourself?

A. In June, 1947, the end of June or the first of July.

Q. Was that after Mr. Hilts left?

A. Right.

Q. Try to fix the date, as best you can, if you will, Mr. Brewer?

A. Oh, some time between the 9th and 24th of July.

Q. Some time between the 9th and 24th of July is the first time you had definitely made up your mind you were going to quit the Paramount Pest Control Service? [34] A. No.

Q. All right. Tell me when you had made up your mind you definitely were going to quit the Paramount Pest Control Service?

A. The end of June.

Q. The end of June?

(Deposition of Charles P. Brewer.)

A. Yes. I told them I was; told both Hilts and Sibert.

Q. The end of June? A. I did.

Q. What date was that? Fix it.

A. Some time after the 25th.

Q. Some time after the 25th did you make an unequivocal statement to Hilts and Sibert you were going to quit Paramount Pest Control?

A. I told them I would carry the business through the month of March—or July, rather.

Q. Yes. So there could have been no doubt in their minds but what that was an oral notification to them that you would work through the month of July but no longer for Paramount Pest Control Service?

A. I don't know what to say. You start off to say one thing and then change to another.

Q. You answer it.

A. If it can be read so I can understand it——

(Question read.)

A. None whatever. [35]

Q. (By Mr. Smith): Is that correct?

A. That is right.

Q. Prior to telling them that, Mr. Brewer, how long prior to that had you made up your mind you were going to go into the pest control service for yourself?

A. I hadn't made up my mind to do it.

Q. When did you make up your mind you were going into the pest control service?

(Deposition of Charles P. Brewer.)

A. Some time in the month of July.

Q. Approximately when?

A. Oh, between the 10th and 25th.

Q. Between the 10th and 25th, and when was it that you made out your last check to Mr. Hills?

A. I imagine somewhere around the 9th of July.

Q. The 9th of July?

A. I suppose. It is one of the exhibits here.

Q. Did you make up your mind you were going into the pest control service for yourself before or after you gave the company their last check?

A. It was after.

Q. How soon after?

A. I couldn't say the exact date.

Q. About when?

A. Somewhere between a week or two weeks.

Q. When did you first begin to solicit Paramount Pest Control [36] Service customers?

A. The first day of August.

Q. And prior to that did you solicit any of their customers? A. None whatever.

Q. Prior to that time did you tell any of their customers that Paramount Pest Control Service was not going to be rendering pest control service any longer? A. I did not.

Q. Did you advise them that there was going to be a change? A. Who?

Q. Any of the customers that you were servicing for Paramount Pest Control Service?

A. Oh, yes. I notified some that I was leaving Paramount.

(Deposition of Charles P. Brewer.)

Q. When was the first time that you notified any customers that you were leaving Paramount Pest Control Service?

A. After I made up my mind to.

Q. Fix that on a calendar date.

A. Oh, well, it would be some time during July.

Q. During the month of June you never told any customers you were leaving Paramount?

A. I had no intention of it at that time.

Q. But during the month of July you did?

A. I told a few, yes.

Q. When you say you told a few, how many did you tell? A. I have no idea. [37]

Q. Well, then, if you have no idea, how can you say you told a few?

Mr. Bernard: I object to the question as being argumentative; object to the form of the question.

Mr. Smith: Can it be answered?

Mr. Bernard: Surely.

A. I don't know whether——

Q. (By Mr. Smith): Would you name some of them that you told?

A. I told Safeway Stores, Incorporated.

Q. Who else?

A. I told Albers Milling Company.

Q. Yes.

A. Fisher Flouring Mills—no, I didn't. Hudson-Duncan Company.

Q. Who else? A. I know of those three.

Q. What did you tell them?

(Deposition of Charles P. Brewer.)

A. I told them that I was leaving Paramount.

Q. Didn't you also tell them you were going into business for yourself?

A. I don't know whether I did or not.

Q. Didn't you also tell them you could render the same service to them?

A. I told them that the first of July, or the first day of August. I told them I could do that.

Q. Did you ever tell anyone, prior to the first day of August, [38] that you could render pest control service?

A. I don't remember the exact—not the exact time.

Q. I think if you will just take a second to think it over, Mr. Brewer, you can definitely say whether or not you told any Paramount Pest Control customer, prior to August 1st, that you could render them pest control service.

Mr. Bernard: I object to that as not being a question. It is merely a statement to the witness that if he thinks it over he can definitely state something. There is no question.

Mr. Smith: That is right.

Q. Bearing in mind what I have said, Mr. Brewer, I will ask you the same question again. Would you care to answer it?

A. What question?

Q. Whether you told any Paramount Pest Control customers, prior to August 1st, that you could render, as an individual, pest control service to them?

(Deposition of Charles P. Brewer.)

A. I probably told one or two that I could.

Q. Then the purpose of telling them that was to get their business?

A. I was asked what I was going to do, probably.

Q. As a matter of fact, on August 1st, you stepped right in and took over a great number of Paramount Pest Control Service customers?

A. No. We went soliciting August 1st.

Q. Of course, when you went soliciting, you went to those whom [39] you, as a Paramount Pest Control Service agent, had previously solicited and served? A. Some of them were, yes.

Q. Whom did you talk to at Hudson-Duncan?

A. Herb Lacey.

Q. At Albers, you talked to Mr. Flanagan?

A. Right.

Q. Fisher Flouring Mills, did you talk to Miss Dayton? A. I don't know.

Q. Some woman there anyway?

A. Some woman there. I never talked to Fisher Flouring Mills myself.

Q. Safeway Stores, you talked to Mr. Blair there? A. Right.

Q. Who are some of the others that you had spoken to? A. Those are the ones I remember.

Q. How about over at this Pioneer Fruit Company?

A. I never talked to anyone in Pioneer Fruit.

Q. Did you talk to any of these fruit people over there? A. I did not.

(Deposition of Charles P. Brewer.)

Q. There is one other thing I want to get to. When you set up this Brewer Pest Control Service, whom did you hire to work for you?

A. August 1st, I hired Raymond Rightmire.

Q. What other men did you hire? [40]

A. And Earl Merriott, shortly thereafter or at that time. I don't remember the exact dates.

Q. Following that, whom did you hire?

A. I hired Carl Duncan somewhere around the 20th of August.

Q. When did you hire Merriott?

A. Some time around the first of August.

Q. When did you hire Rightmire?

A. The first of August.

Q. Whom else did you have working for you?

A. That was all.

Q. These three men, Rightmire, Merriott and Duncan, all three of them were employees of Paramount Pest Control Service? A. Formerly.

Q. Yes. And these men knew the customers of the Paramount Pest Control Service in the Oregon vicinity?

A. They had a list of the territory that they were to service.

Q. And they had serviced Paramount Pest Control customers and they still had that list with them?

A. No.

Q. What happened to that list?

A. It was left at the office.

Q. Were any copies ever made of that list?

A. No, sir.

(Deposition of Charles P. Brewer.)

Q. Even though copies were not made, Mr. Brewer, you boys could, by memory, know the principal customers of the Paramount Pest Control [41] Service? A. We could remember some.

Q. In going your routes and soliciting customers, you, of course, would pick up these old customers of the Paramount Pest Control Service?

A. If they wanted our service, if they ordered our service, we serviced them.

Q. You would solicit them, would you not?

A. We solicited not only Paramount but others.

Q. When you would go in to solicit their service, their business, what would you tell them?

A. Tell them we were the Brewer Pest Control looking for customers.

Q. What would you tell them, as far as the Paramount Pest Control Service was concerned?

A. We didn't tell them anything about the Paramount Pest Control Service.

Q. Did you, at any time, ever say that the Paramount Pest Control Service was not servicing these customers in this vicinity?

A. I never said that, nor any of my men.

Q. Mr. Brewer, at the termination of this agreement, did you turn over to the Paramount Pest Control Service all of the stocks and merchandise, chemicals and equipment that you had previously used for pest control service?

A. After they agreed to settle according to an audit of the books [42] made by a Portland concern,

(Deposition of Charles P. Brewer.)

I agreed to turn over the equipment to them. An inventory was taken of all supplies and equipment and office equipment and supplies, and I turned it over to them, all except two articles which were inventoried and are still waiting for them to come and get.

Q. What two articles were they?

A. It is a spray trailer and a fog machine.

Q. Where are those articles now?

A. Those articles are at my home.

Q. They can come out and get them any time they want to? A. Yes. I told them that.

Q. Other than these two pieces of equipment, did you retain any of their chemicals?

A. None whatever.

Q. Did you retain any of their stock?

A. Their stock—you are speaking as a corporation, and it was all my equipment and stock. I did not retain it.

Q. In other words, you considered that you had bought these supplies and they were yours?

A. It was my money.

Q. Those things, you did not turn in to the company?

A. Those things, I turned all of them in to the company.

Q. You did?

A. All except those two articles, one of which I would have to park out on the street, and the other one—I couldn't locate [43] it at that particular time. The boys had it.

(Deposition of Charles P. Brewer.)

Q. I am afraid you do not understand my question. In pest control service you need poisons and supplies, things of that kind? A. We do.

Q. Did you turn all of these poisons and supplies and other chemicals back to the company?

A. I turned over the warehouse keys and all supplies in it, also the office.

Q. You did not answer my question directly.

A. I did.

Q. Did you turn back every bit of poisons and supplies which you had previously used?

A. I turned back all supplies and equipment on hand.

Q. When you started out on August 1st, what poisons and supplies did you have?

A. Only what I went out and bought.

Q. Where did you buy them?

A. At the chemical warehouses around town.

Q. From whom did you buy most of them?

A. I bought some of them from this and that and the other.

Q. Where are they located?

A. Northwest district. I don't know their addresses off hand. I bought from McKesson & Robbins, I bought from Northern Wholesale Hardware Company, the Chown Hardware Company—— [44]

Q. Did you buy them for cash or did you set up accounts with them?

A. No. Some of those were paid by accounts and some were paid by cash.

(Deposition of Charles P. Brewer.)

Q. In other words, all the supplies, poisons, chemicals and other equipment which you used subsequent to August 1st were things that you went out and bought yourself as distinct from supplies which you got from the Paramount Pest Control Service?

A. I believe that is misstated. I don't understand it.

Q. Will you state it correctly, then.

A. What was the question?

(Question read.)

A. Those were all the same supplies I had used prior to August 1st.

Q. What I have been trying to get at for the last fifteen minutes is: What have you done with all of the supplies and equipment which you had received from the Paramount Pest Control Service?

A. Didn't receive any from them. I left—all supplies and equipment that I had on hand as of July 31st I left there.

Q. Yes. Then, if such is true, doesn't it follow, as a matter of fact, that all of the chemicals, supplies and equipment, poisons and merchandise, which you used in the Brewer Pest Control Service subsequent to August 1st were equipment, supplies, merchandise and poisons which you bought separately and did not [45] receive from the Paramount Pest Control Service?

A. I bought all supplies and equipment used in the Brewer Pest Control Service after the first of August.

(Deposition of Charles P. Brewer.)

Q. Did you buy any before? A. No.

Q. All that you bought after August 1st you would naturally buy from someone other than Paramount? A. Right.

Q. So, all of the equipment, poisons and things that you had on hand or which you obtained from the Paramount Pest Control Service were either used up or left in the warehouse and turned back to Paramount?

A. I had bought all the supplies and equipment in the State of Oregon for Paramount Pest Control Service, but I left all that with Paramount.

Q. In other words, you did not take anything with you when you left there?

A. I did not take any supplies or equipment of Paramount.

Q. And you did not take any of their poisons?

A. No.

Q. Did you take any of their formulas?

A. They did not have any formulas.

Q. Did you take any of their records?

A. No, I didn't.

Q. Mr. Brewer, regarding this car which you purchased, what [46] was that purchased with? Whose funds? A. My own.

Q. Is that money you took out of the business?

A. Money I wrote a check out of the business for.

Q. Did you consider that money in the business? Did you consider that your money or Paramount's money?

(Deposition of Charles P. Brewer.)

A. It was my money. I had opened a bank account with my own money and I operated from that bank account.

Q. So, the money which you used to buy that car with was your own personal funds?

A. It was my company funds.

Q. You were not indebted to the company at that time?

A. What do you mean, indebted to the company?

Q. That was not money owing to the company at that time?

A. What company?

Q. Paramount.

A. Corporation?

Q. Yes.

A. I may have owed them money.

Q. But it was not due?

A. It could not have been due because I did not have it to pay to them.

Q. What?

A. I did not have money to pay to them. They could not press me for payment according to our agreement. [47]

Q. I see.

A. And when they refused to furnish me a car or truck or any conveyance, I told them I had to have a car and Ted Sibert told me personally that I had to go and buy one if I wanted it.

Q. Did you go out and buy one?

A. I did.

Q. When did you buy it?

A. I don't remember the date.

Q. You can give us the approximate date.

A. I don't know. It is someplace in your complaint I think.

(Deposition of Charles P. Brewer.)

Q. Give us the date the best you can.

A. I don't have any idea; somewhere in that spring.

Q. March?

A. Some time between March and June.

Mr. Stott: What year?

A. 1947.

Q. (By Mr. Smith): The money which you took to buy that with was money that was drawn out of the Paramount Pest Control account?

A. In Portland, yes.

Q. That car, was that put in the name of the Paramount Pest Control Service?

A. It was not.

Q. Was it put in your own personal name?

A. It was put in my personal name. [48]

Q. Do you have that car now? A. I do.

Q. Do you use that car in the business?

A. I do.

Q. Mr. Brewer, you of course are acquainted with this clause in the contract which provides: "The agent further agrees that for a period of three years after the termination of this agreement, or his period of employment, he will not, directly or indirectly, communicate or divulge to or make use of for the benefit of any person, partnership or corporation any of the trade secrets, formulas, processing methods of the company, or the names, addresses or requirements of any of the customers of the company or any other information related to the com-

(Deposition of Charles P. Brewer.)

pany's business which he may have acquired or learned during his employment."

Have you lived up to that provision?

Mr. Bernard: I object to that as calling for a conclusion of the witness, calling for his opinion on the issues as framed by the pleadings.

Mr. Smith: Can he answer it, subject to the objection?

Mr. Bernard: No, I will not have him answer that unless the Court orders it.

Q. (By Mr. Smith): Then, in this agreement, you agreed further that you would not, either as an employee, employer or otherwise, canvass, solicit or cater to any of the customers of the company [49] which you may have known by virtue of your employment. You have, however, solicited these customers, have you?

A. I have solicited firms that were at one time on Paramount's books.

Q. Do you consider it is your right to go into the pest control service in this area?

A. There is nothing that says I can't in the contract.

Q. There is a provision in the contract which prohibits you from canvassing or soliciting these customers, isn't there?

Mr. Bernard: I object to that as the contract speaks for itself.

Mr. Smith: That is true, but I want to get this man's idea on it.

(Deposition of Charles P. Brewer.)

Mr. Bernard: His ideas are framed by the pleadings in this case, set out in writing. If you want to inquire as to the fact as to what he has done, I have no objection, but as to his opinion as to the legal conclusion that followed from his actions, then I object to that. In other words, you are asking for his opinion on the legal questions involved in this case. I have no objection to your asking what he has done; I haven't the slightest objection. Then it will be for the Court to say whether or not what he has done is a violation of the contract under the issues in the case and the facts in the case.

Q. (By Mr. Smith): Mr. Brewer, all the time that you were working as agent for the Paramount Pest Control Service, they were [50] a California corporation; you, of course, knew that they were a corporation?

A. I knew—I understood they were a corporation.

Q. You dealt with them as such?

A. As such.

Q. Yes. When is the first time you told the Paramount Pest Control Service, if you told them at all, that you were going into the pest control service for yourself? A. About August 6th.

Q. So you were already in the business before you notified them of it? A. Yes.

Q. When you notified them of it, they had already known it before anyway?

A. They asked me if I was.

(Deposition of Charles P. Brewer.)

Q. In other words, not so much a notification as it was an admission? A. Right.

Q. Mr. Brewer, if I understand you correctly, regarding this contract, your only contention of a breach is your contention that Mr. Hilts insisted on a division of 20 per cent instead of the agreed division of fifty-fifty, as made by him and Ted Sibert?

A. No, Ted Sibert revoked that himself in the presence of Hilts, stating it would go back on a 20 per cent the first day of July. I told him I would not have anything to do with them on a 20 per [51] cent basis.

Q. When did he say that?

A. About the first of July.

Q. He said that about the first of July?

A. Yes.

Q. Who was present at that time?

A. I don't remember all that were there. It was in the office of the corporation there in Oakland.

Q. But other than this question of whether it should be a 20 per cent basis or fifty-fifty basis, you did not make any other contention that the company breached their contract?

A. They breached it on one point. They tried to run it back to 20 per cent and I would not operate under that setup.

Q. As far as your present frame of mind is concerned, you had no other complaint?

A. I had lots of complaints.

(Deposition of Charles P. Brewer.)

Q. Well, I mean complaints that were serious enough to be considered a breach of contract.

A. Not any one of them.

Q. Then what were your complaints in the aggregate?

A. It would take a long time to try to enumerate them.

Q. We have got the time. Go ahead and enumerate them.

A. Well, for one thing, I couldn't trust them.

Q. You couldn't trust whom?

A. They had broken too many managers over too many pretenses [52] that I knew of up and down the Coast; they had gotten too many managers in the red by making them borrow money to give to them; they were always after me to try to get me to borrow money and give to them; they tried to get me to change my personal automobile from my name into the name of the Paramount Pest Control Service; in twelve months' time they were after me at least nine times to do that; and I knew they had broken managers up and down the line and run in and grabbed supplies and equipment. I knew they could not be trusted when they would not live up to their contracts and I broke from them.

Q. Anything else.

A. That is a part of it; a good part of it.

Q. What is the other part?

A. That is the majority of it.

Q. Is there anything else that is of any concern, that is not trivial?

A. Not too much so, no.

(Deposition of Charles P. Brewer.)

Q. Mr. Brewer, what did you instruct Rightmire and Duncan and Merriott to say when they approached customers?

A. I never instructed them to say anything.

Q. In other words, they were on their own to say anything they chose?

A. No. They were not to knock anybody. That has always been my policy.

Q. I appreciate that, but as to what explanation that they [53] should give as to why they were not with Paramount any more?

A. They were working for Brewer's Pest Control.

Q. Did you instruct them to always tell customers, before they went in to make a service and when they went in to make a canvass—did you instruct them to always explain to the customer that they were not any longer working for Paramount Pest Control Service?

A. I never instructed them on any sales talk. They are men of integrity and they would not go in talking about Paramount Pest Control Service when they were working for the Brewer's Pest Control.

Q. So you never gave them any instructions as to what to say when they approached a customer?

A. Never at any time.

Q. Regarding yourself, Mr. Brewer, when you approached a customer, did you always explain to the customer that you were no longer working for Paramount Pest Control Service?

(Deposition of Charles P. Brewer.)

A. If it ever came up and they ever asked me, I did.

Q. If they did not ask you——

A. I told them I was with Brewer's Pest Control.

Q. But you always skipped around that tender point as best you could, is that right?

A. There was no tender point.

Q. But you would never tell them, then, that you were no longer representing the Paramount Pest Control Service, unless [54] they asked you?

A. If they had known I had been with Paramount Pest Control Service, I told them that I was in business for myself under my own name.

Q. Did you do that in every instance?

A. Lord, no.

Q. So, there were instances, then, when you would go in and do a servicing job for someone who had previously been served by you when you were working for Paramount Pest Control Service, and at that time you neglected to tell them you were in business for yourself?

A. They seldom asked me if I was. If so, I always said yes. I solicited lots of accounts I had never known before, never had been near under the name of Paramount. I went in and told them I was Brewer's Pest Control, and as to any accounts that had previously been Paramount Pest Control Service accounts, I went in and told them I was Brewer's Pest Control.

(Deposition of Charles P. Brewer.)

Q. Any time you served in your own individual capacity some customer who was previously a Paramount Pest Control Service customer, you always told them that you were no longer with Paramount?

A. I did not mention Paramount. Our talk was, when we entered a building, regardless of whether it was a sales pitch or service, "We are Brewer's Pest Control." That is the way we enter buildings.

Q. Is it not a fact, Mr. Brewer, that there are instances when you would go ahead and do your job and then it was not until the job was finished and the ticket was written out for it, for the job, after the job was completed, that you would tell the party you were no longer connected with Paramount?

A. No, sir. Any time we do service, the people know they are having service from Brewer's Pest Control.

Q. Every time? A. Always.

Q. Going back to this assumed business name, the business, you say, was put in Rosalie Brewer's name, principally because you did not have time to go up to the Court House that particular afternoon; then, later on, her certificate was withdrawn and yours was put on record. Does she have an interest in that business? A. She is my wife.

Q. Yes. Well, did you figure that you and she started out from scratch and that she helped you in that business and, therefore, she had an interest in the business? Is that it?

A. Half the money that is used or made is hers.

(Deposition of Charles P. Brewer.)

Q. So she really would have an interest in the business even though we did not have the community property law?

A. The community property law makes——

Q. You don't answer the question.

A. What was the question? [56]

Mr. Bernard: If you are not familiar enough with the law to answer that, you are free to say so, Mr. Brewer.

A. Well, all I know is that, as my wife, she has an interest in anything I have.

Mr. Smith: Does she have that by virtue of the fact that she is your wife or by virtue of the fact that she worked in the business?

A. By virtue of the fact that she is my wife.

Q. Well, did she work in the business with you?

A. She is not on the payroll, if that is what you mean.

Q. Does she come down to the office and do any work?

A. She helps me out now and then when I need help.

Q. Does she work in the office?

A. She does when she helps, yes.

Q. You are a little evasive. I want you to come right out and lay it right on the line.

A. She is not a paid employee. If there is any office work to be done that I don't do and I ask her to do it, she does it.

Q. How many hours a week or a month or how much time does she put in?

(Deposition of Charles P. Brewer.)

A. It varies; sometimes an hour a day, days when she works; two or three or four hours a week.

Q. In other words, she does not get any salary?

A. None whatsoever.

Q. But she does participate in the profits of the company? [57]

A. There hasn't been any profits. Any money I make, she is bound to enjoy part of it as my wife.

Q. In other words, she can draw money out of the company and use it for family expenses or for buying her clothes?

A. Not for herself, she cannot.

Q. How is it her money, then?

A. It isn't her money as long as it is in the company.

Q. Then, is it your contention that she has an interest in the business because of the community property law?

A. No, by virtue of being my wife.

Q. And not by virtue of the fact that she does any work?

A. The work is not the reason that gives her any part of the business?

Q. What?

A. The work that she does is not the reason for her owning any part of the business.

Q. In other words, you just feel that any wife has a financial interest in her husband's business?

A. She has an interest in it.

Q. You consider her as a part owner?

A. I consider her as my wife.

(Deposition of Charles P. Brewer.)

Q. Answer the question. Do you consider her as a part owner?

A. As my wife, she owns anything I own.

Q. In other words, you and your wife own the business together? A. Under the law, we do.

Q. So, then, you consider, as far as title to this business is concerned, it is just as much your wife's as it is yours?

A. As much her business as mine, I suppose. I don't know how the law would read on that.

Q. Getting back to this question which was not answered, for the purpose of the record, Mr. Brewer, I want it made clear. Mr. Bernard made an objection to your answering this question about you doing business within a period of three years. Of course, this is not Mr. Bernard's deposition. It is your deposition but, nevertheless, he is your attorney and apparently I would conclude he advises you not to answer the question, so I want the record clear as to whether you, Mr. Brewer, refuse to answer the question.

Mr. Bernard: If it is the question I objected to, he certainly does object to it and I will advise him not to answer the question.

Q. (By Mr. Smith): You are, Mr. Brewer, of course, following the advice of your attorney?

A. Of course.

Q. I will ask you, in conducting this pest control service for the Brewer Pest Control Service, are you using the same methods or similar methods as used with the Paramount Pest Control Service?

(Deposition of Charles P. Brewer.)

A. I use methods used by the pest control industry.

Q. You have not answered my question. [59]

A. Paramount—I don't know all of their methods. I know our methods. Our methods were not always Paramount's methods.

Q. But you do use Paramount's methods?

A. I don't know what their methods are except the ones—I know the methods that we use.

Q. Did you work in pest control service before working for Paramount Pest Control Service?

A. I did not.

Q. Did you go through any period of training with them? A. One week.

Q. Whom did you work under?

A. Carl Duncan.

Q. During this period of one week, did Carl Duncan show you the way they eradicated insects and various pests?

A. As much as he could, he did, yes.

Q. Whereabouts did you work with Carl Duncan? A. In Oakland, California.

Q. Working with him that one week, that is the first time you ever had any pest control experience?

A. It is.

Q. Then, after working that one week with Carl Duncan, what did you do? A. I went selling.

Q. Does that mean soliciting accounts?

A. Soliciting accounts. [60]

Q. How long did you solicit accounts?

A. Oh, a week or two weeks.

(Deposition of Charles P. Brewer.)

Q. Whom did you work under then?

A. They had a sales manager, I think you might call him, in the office that was more or less the head of the personnel.

Q. Was that out of the Oakland office?

A. Right.

Q. After these two weeks selling, what did you do?

A. Did a little trouble shooting here and there.

Q. Who were you working under?

A. The same party, personnel—John Kehoe.

Q. John what? A. John Kehoe.

Q. How long did you do this trouble shooting?

A. Oh, for a week or two.

Q. Then what did you do?

A. I was shipped to Oregon.

Q. When you came up to Oregon, did you immediately take over the Oregon office?

A. Shortly thereafter, yes. There was no office at that time.

Q. You replaced Taylor, did you not?

A. Yes.

Q. Taylor had a place where he received office phone calls? A. Yes.

Q. And stored supplies and things? [61]

A. Yes, in his apartment.

Q. So you took over where Taylor left off?

A. Right.

Q. Who came up here to help you?

(Deposition of Charles P. Brewer.)

A. Harold Hilts came up to help me get the books—to check the books over, and then he went back to California.

Q. Did anybody else work with you?

A. Not at that time. Had somebody working for the company——

Q. Who was that?

A. Some young fellow with a crippled leg.

Q. How long did he continue to work with you?

A. I took over the 10th of April and I think he stayed on the payroll until the first of May.

Q. Then he was the only man working with you from April to May?

A. Here in Portland. There was one man on the payroll in Salem.

Q. Then, after that, whom did you work with that were Paramount Pest Control employees?

A. Some time around the first of May, Ted Sibert came to Oregon and saw the condition I was in, no help, no work, and he called California and got Carl Duncan to come up and, shortly thereafter, I hired Rightmire to go to work—and Carl Duncan—had him up and worked with him three or four days, something like that. [62]

Q. Carl Duncan, is that the man who taught you and Rightmire most of the tricks of pest control and pest eradication?

A. All that he could, during the time that he was with us.

Q. These methods you were taught while working for the Paramount Pest Control Service, you

(Deposition of Charles P. Brewer.)

used those in your own business, or you use those in your own business now? A. Hardly any.

Q. But you do use some of them?

A. None that the entire pest control industry does not use.

Q. Regarding the formulas and poisons that you put around—you are not a chemist, are you?

A. I am not.

Q. How did you learn to mix these poisons?

A. By going to the County Agent and going and talking to my competitors here in Portland.

Q. Did you learn any of that while you were working for Paramount Pest Control Service?

A. No, they had no formulas.

Q. The Paramount Pest Control Service had formulas, though, didn't they?

A. They didn't have any to my knowledge; at least, they could not supply me with any.

Q. Didn't they have poisons?

A. Yes, they had poisons.

Q. Didn't they supply you with poisons? [63]

A. Raw poisons, yes.

Q. Didn't they tell you how the poisons were to be mixed? A. How they were what?

Q. Mixed.

A. They were not mixed. They were bought direct from the stores.

Q. Is it your contention that all the poisons used by Paramount Pest Control Service are poisons which can be bought over the counter from stores, or prepared? A. Almost exclusively.

(Deposition of Charles P. Brewer.)

Q. Give me the exceptions?

A. They used to make a spray that they said they made themselves. I have no idea what it was or what it consisted of. It was furnished to us in bulk, if we wanted to buy it.

Q. But all other poisons can be bought in stores the same as patent medicines can be bought in stores?

A. To the best of my knowledge, they can.

Q. Is it your contention that there is no such thing as secret formulas that the Paramount Pest Control Service have that you used?

A. None that I ever heard of.

Q. You came to Oregon because you were sent up here by Paramount Pest Control Service?

A. Right.

Q. And some of the customers that you are now serving are customers that you met and knew of because of work you did as [64] agent for the Paramount Pest Control Service?

A. Some of them.

Q. And those you have canvassed and solicited to give their trade to you?

A. I have solicited some customers of theirs.

Mr. Smith: That is all that we have.

Mr. Bernard: I have a question or two that I want to ask.

Mr. Smith: Before I forget about it, I might reiterate that you are welcome to the books or the exhibits any time you want them.

(Deposition of Charles P. Brewer.)

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(Deposition of Charles P. Brewer.)

Mr. Scott: We want the audit and you won't give us that.

Mr. Smith: If you ask for it in the right manner and the Court orders it, orders us to give it to you, we will abide by the ruling of the Court.

Mr. Bernard: I should hope you would. That is very generous of you.

Cross-Examination

By Mr. Bernard:

Q. In questioning you about one of these accounts or statements that Hilts presented to you, presented you with, Mr. Smith asked you if you had written any letter denying the account that had been reached between you and Hilts. As a matter of fact, did you and Hilts reach any accounting?

A. Never reached an account.

Q. Now, about this inventory: Tell me what that inventory was [65] and how it was delivered.

A. It was an inventory taken around the first or second day of August by Harold Hilts and myself of the office equipment and office supplies, exterminating equipment and exterminating supplies that I had at the time.

Q. Who took that inventory?

A. That was in the handwriting of Harold Hilts. He and I together made it. He jotted it down as I checked it and called it off and he checked it.

Q. And all of these articles were delivered to the Paramount Pest Control Service?

(Deposition of Charles P. Brewer.)

A. Those were all delivered with the exception of these two items, and I took Harold Hiltz out and let him see those items and——

Mr. Smith: If you don't mind an interruption, could you give me those items and tell me where they are?

A. There is one hi-fog machine and one spray trailer.

Q. One hi-fog machine and one what?

A. One trailer.

Q. One spray trailer?

A. A spraying machine trailer.

Q. Whereabouts are they?

A. Those are at my home.

Q. Where is that located?

A. That is at 4929 Northeast 28th Avenue. [66]

Q. 4929 Northeast 28th?

A. Yes. If they are willing to pay for those, they can have them.

Q. That is different. How much?

A. Their value, minus depreciation.

Mr. Smith: I trust you don't mind this interruption?

Mr. Bernard: Go ahead.

Q. (By Mr. Smith): In other words, you have those, but you won't give them up unless you are paid their purchase value less depreciation?

A. That is what they were to pay me for, all of my supplies, and they have not paid me for any of them yet. I do not feel I should turn over more of them under the same conditions.

(Deposition of Charles P. Brewer.)

Q. So, then, if they went out to get them now, they would not get them?

A. At the present moment, no. At the time of the contract, they would.

Q. What?

A. Had they wanted them at the time, when they agreed to settle with me according to the audit, they would have had them if they had come and got them.

Q. They could have had them on August 1st without paying you anything further?

A. They could have.

Q. (By Mr. Bernard): Now, outside of the property that was in [67] the office at the time, about August first, where was the other property, Mr. Brewer?

A. It was in a warehouse at 15th Northwest and Marshall.

Q. How was that delivered to the Paramount people?

A. It was delivered to them in this respect: I had refused them entrance to there until such time as we had made an agreement or reached an agreement that was reached between T. C. Sibert and Harold Hilts and a few others and myself in the presence of the others.

Q. What was that agreement?

A. The agreement was that they would pay me for my supplies and my equipment, both office and extermination, and we would settle our accounts according to a C. P. A. audit of the books done by a Portland accounting firm.

(Deposition of Charles P. Brewer.)

Q. What did you do then towards turning the supplies over to them?

A. I met Harold Hiltz and Wendy Fisher up at the building in which our office was and our supplies were stored. I called the manager of the building out there and told him as of that date forward the Paramount Pest Control Service would have the use of that building that I had rented, the room that I had rented there.

Q. And did you have a key to it?

A. At that time I had a key, and I gave them a key then.

Q. Did you discuss with these men who should make that audit? [68]

A. Yes. They asked me who to go to to make an audit and I said I didn't know of any firm in town except one that I knew of that was in the same building where the office was at that time.

I said, "There is a firm there. I know they are accountants," and the next morning—their names, by the way, are Jones and Young.

The next morning T. C. Sibert went to them and told them about the split-up between myself and Paramount, and asked them if they would audit the books. And Mr. Young, as I understand, told him he would.

Mr. Young asked me for my copy of the franchise and got a copy from them, and went in and sat down to do an audit of the books. T. C. Sibert came back and jumped on him and said he understood he was going to try to hang the Paramount Pest Con-

(Deposition of Charles P. Brewer.)

trol Service, and Mr. Young threw both of his hands in the air and told him he wouldn't have anything to do with the books, that is all, and he in turn took up the phone and called Sawtell, Goldrainer & Company.

Q. Who did you say took up the phone?

A. Mr. Young told Mr. Sibert he could recommend him or he would call and, from what I understood, Mr. Young called Sawtell, Goldrainer & Company and told them that there was a set of books there that we wanted an audit made of and would they do it and they said they would and they sent a man down there [69] and pulled an audit on those books.

Q. Is that the audit that you have requested an inspection of? A. Yes, sir.

Mr. Bernard: That is all.

Mr. Smith: You don't want the books?

Mr. Bernard: If I want the books, I know how to get them.

Mr. Smith: All right.

And Further Deponent Saith Not.

(Signature of witness to the foregoing deposition expressly waived by the witness and by counsel for the respective parties.) [70]

[Title of District Court and Cause.]

State of Oregon,
County of Multnomah—ss.

I, Ira G. Holcomb, a Notary Public for Oregon, do hereby certify that on the 7th day of January, A.D. 1948, before me as such Notary, at Room 503 United States Court House, in the City of Portland, County of Multnomah, State of Oregon, personally appeared at the time and place mentioned in the caption and stipulation set out on pages numbered 1 and 2 of the foregoing transcript Charles P. Brewer, a defendant, produced as an adverse party on behalf of the plaintiff.

Mr. F. Leo Smith and Mr. George E. Birnie, of attorneys for plaintiff, appearing in its behalf; and Mr. E. F. Bernard and Mr. Plowden Stott, attorneys for defendants, appearing in their behalf; and the said witness being by me first duly sworn to testify the truth, the whole truth and nothing but the truth, [71] and being carefully examined, in answer to oral interrogatories and cross-interrogatories propounded by the attorneys for the respective parties, testified as in the foregoing annexed deposition, pages numbered 1 to 70, both inclusive, set forth.

I further certify that all interrogatories and cross-interrogatories propounded to said witness, together with the answers of said witness thereto and all objections and motions taken or made, and other proceedings occurring upon the taking of said

deposition, were then and there taken down by me in shorthand and thereafter reduced to typewriting under my direction; and that the submission of the deposition, when fully transcribed, to the witness for examination and reading to or by him, and opportunity to the witness to make any changes in form or substance and signing of same by the witness were waived by the witness and by the parties; and that said deposition has been retained by me for the purpose of sealing up and directing it to the Clerk of the above-entitled Court, as required by law.

I further certify that I am not a relative or employee or attorney or counsel for any of the parties, or a relative or employee of such attorney or counsel, or financially interested in the action.

In Witness Whereof, I have hereunto set my hand and notarial seal this 9th day of January, A.D. 1948.

[Seal] /s/ IRA G. HOLCOMB,

Notary Public for Oregon.

My Commission Expires July 21, 1948. [72]

[Endorsed]: No. 11892. United States Circuit Court of Appeals for the Ninth Circuit. Paramount Pest Control Service, a corporation, Appellant, vs. Charles P. Brewer, individually and doing business as Brewer's Pest Control, Rosalie Brewer, his wife, Raymond Rightmire, Carl Duncan and Earl Merriott, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed April 8, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
Ninth Circuit

No. 11892

PARAMOUNT PEST CONTROL SERVICE, a
corporation,

Plaintiff and Appellant,

vs.

CHARLES P. BREWER, individually and doing
business as BREWER'S PEST CONTROL;
et al.,

Defendants and Respondents.

ORDER RELIEVING APPELLANT FROM
PRINTING OR REPRODUCING EXHIBITS

On the Application of Paramount Pest Control Service, a Corporation, Appellant in the above entitled matter, and the Affidavit of Kenneth C. Gillis supporting said Application. and good cause appearing therefore;

It Is Hereby Ordered that Appellant, Paramount Pest Control Service, a Corporation, be and it is hereby relieved from printing or reproducing the Exhibits to be used on Appeal in the above entitled matter and that said Exhibits shall be used in their original form.

Dated: April 19, 1948.

/s/ FRANCIS A. GARRECHT,
Judge.

[Endorsed]: Filed April 19, 1948.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF THE POINTS ON WHICH
APPELLANT INTENDS TO RELY ON
APPEAL; DESIGNATION OF PARTS OF
RECORD TO BE PRINTED

1. Appellant adopts in full the Points on which he intends to rely as specified in the record on file with the above entitled Court.

2. Appellant designates the following parts of the record to be printed, namely: (1) The entire certified typewritten record, the Deposition of Charles P. Brewer, and this statement and certificate, excluding Exhibits. (2) The Order of this Court relieving Appellant from printing or reproducing Exhibits and permitting them to be considered in their original form.

Dated: April 21, 1948.

/s/ ROBERT R. RANKIN,

/s/ KENNETH C. GILLIS,

Attorneys for Appellant.

[Affidavit of service by mail attached.]

[Endorsed]: Filed April 22, 1948.

**IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

PARAMOUNT PEST CONTROL SERVICE, a
Corporation, *Appellant*

vs.

CHARLES P. BREWER, individually and
doing business as Brewer's Pest
Control, ROSALIE BREWER, his wife,
RAYMOND RIGHTMIRE, CARL
DUNCAN, EARL MERRIOTT and all
other persons associated with said
appellees, *Appellees*

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE DISTRICT OF OREGON

APPELLANT'S OPENING BRIEF

FILED

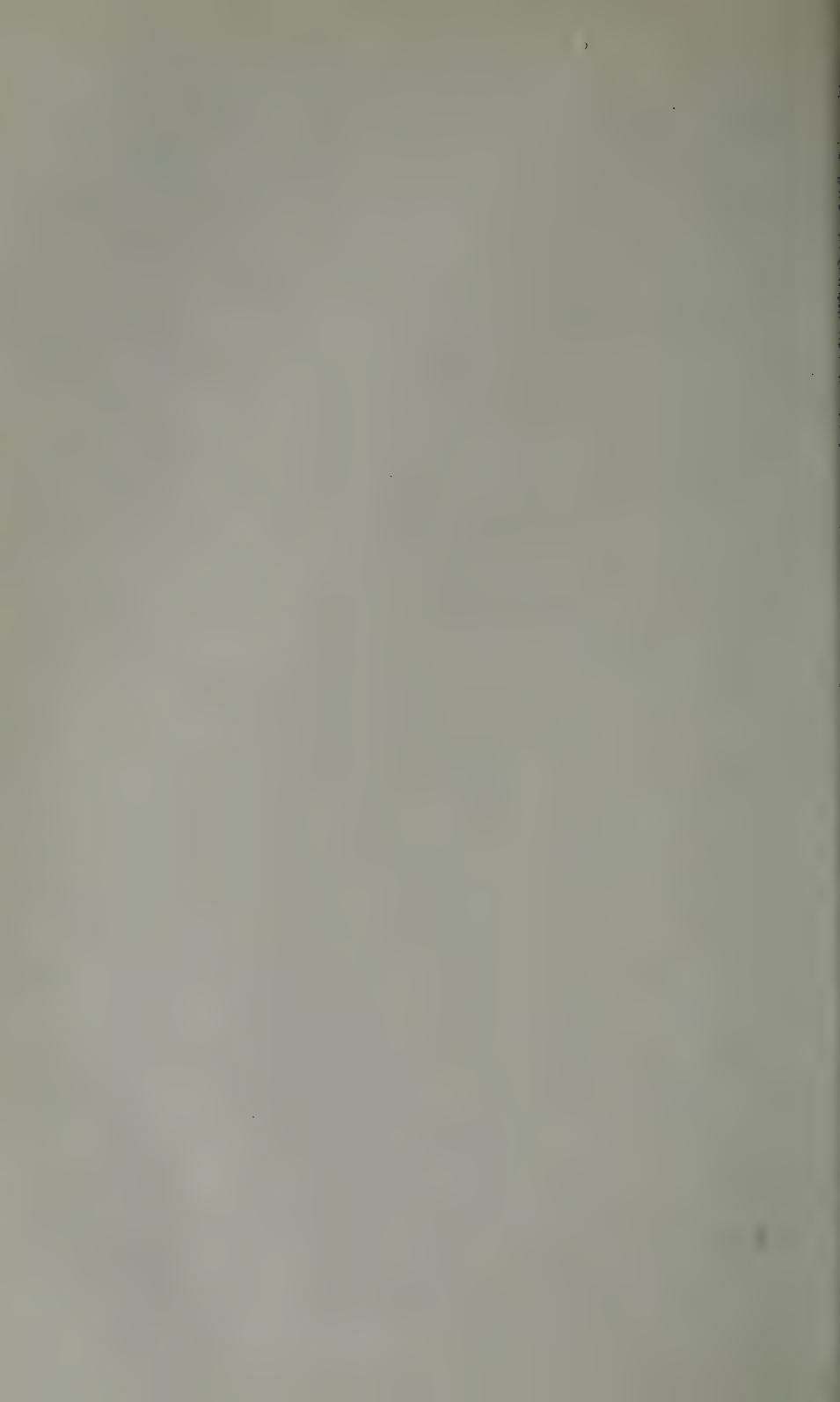
JUN 28 1948

PAUL P. O'BRIEN,
CLERK

KENNETH C. GILLIS,
1103 Central Bank Building,
Oakland 12, California

ROBERT R. RANKIN,
710 Yeon Building,
Portland 4, Oregon

Attorneys for Appellant



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ABBREVIATIONS

1. Numbers without other designation refer to pages in the "Transcript of Record."
2. Appelle Charles P. Brewer is referred to as "Brewer" and his wife as Rosalie Brewer.
3. A full citation of authorities is contained in the Table of Authorities.

**IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

PARAMOUNT PEST CONTROL SERVICE, a
Corporation, *Appellant*

vs.

CHARLES P. BREWER, individually and
doing business as Brewer's Pest
Control, ROSALIE BREWER, his wife,
RAYMOND RIGHTMIRE, CARL
DUNCAN, EARL MERRIOTT and all
other persons associated with said
appellees, *Appellees*

No. 11892

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE DISTRICT OF OREGON

APPELLANT'S OPENING BRIEF

STATEMENT OF JURISDICTION

This is an appeal from the District Court's refusal to grant appellant an injunction against former employees to prevent their taking appellant's business and the Court's refusal to award damages caused by these employees.

1. Appellant made allegations of "Diversity of Citizenship" (2). Exhibit 3 proved appellant a California corporation, authorized to do business

in Oregon since August 25, 1947 (117-8). The answer of appellees admits the allegations of diversity (2, 68) and jointly and severally alleges the appellees' citizenship in Oregon (69). There was un-denied proof of such diversity (264, 414, 434, 440).

2. A claim was made in the complaint for the amount of \$15,169.79 (21-25). With credits subsequently allowed, this was reduced to \$12,950.00 (372-388). Appellant recovered nothing (77). Such claims and denial thereof provided jurisdiction both in the trial and appellate courts. *Hilton v. Dickinson*, 108 U. S. 165, 175.

3. The District Court had jurisdiction of this suit of a civil nature in equity, exceeding, exclusive of interests and costs, the sum of \$3,000.00, as between citizens of different states. 28 U. S. C. A. §41 (1).

4. This Circuit Court of Appeals has jurisdiction over the District Court of Oregon (28 U.S.C.A. § 211) and of this appeal from a final judgment thereof. (28 U. S. C. A. § 225).

STATEMENT OF CASE

The pest control service was separately started by T. C. Sibert in 1927 (114) and G. H. Fisher in 1935 (399) and consolidated in a partnership in 1938 (172) and brought to Oregon in July, 1942 (115) with a new idea in chemicals (116). They worked long hours, trained employes (115-6, 125), manufactured their poisons (Ex. 5 (1) to 5 (26);

118, 123), some unique (124, 174, 187-201), employed an entomologist (124, 185) who is extremely efficient (184-205), spent lots of money (166) which was invested in the business (167), and invented formulae to get a particular product to do a certain job against a specific pest (125, 174). Some of the formulae were furnished Brewer (176) and Duncan (175) when necessary to do their work in an efficient professional way (169). It owns its own building (173) and does business in four states (126).

Brewer applied for employment in January, 1946 (135, 142) without previous experience (135). He trained from February to April and was further instructed in Oregon under Duncan (Ex. 22, Ex. 51; 140). In April he was given a Branch Manager appointment (144), groomed for the Oregon territory (177) and trained by Duncan, Hilts (178) and Fisher (178) and in February, 1946, given copies of the Managers and Sales Agents Agreements (401) which were read (144-6), explained to him and approved by him (370, 401). He was ready to assume active service. The Sales Agents Agreement, also herein called franchise, was mailed to him two days before he signed it in July, 1946 (144).

From July, 1946, to September 12, 1946, the franchise was in full effect, including its Section 5 (147, 210). In September, at Brewer's request and for his reasons (181), Section 5 alone of the franchise was changed with respect to payment, to the effect that if Brewer took any money for himself,

an equal amount was to be paid Paramount (147, 181, 307), which was effective until December 31, 1946 (155). This for brevity is called "the dollar for dollar basis" and is admitted by Brewer (475). For emphasis, we repeat no other section of this franchise was ever changed. However, in October, he received an accounting on the original Section 5 basis and paid it without objection (211).

From January to March 1, 1947, the original franchise was again in full effect and Brewer made three voluntary payments thereon after a conference with Hilts (214) in accordance with the original Section 5 (214-217) (Ex. 57 to 61, Ex. 30 to 35). He admits recognizing the original franchise and making these three voluntary payments (303-4). Rosalie Brewer sent the February, 1947 payment and apologized for not sending it in full (Ex. 81) although she testified she did not know Paramount was asking for money (449).

In March, 1947, compensating for developing the Eastern Oregon territory, Paramount again voluntarily (155-6) changed the amount of payments under Section 5 to the "dollar for dollar" basis effective from January 1st to March 1, 1947 (Ex. 29; 257). This was done by Hilt's letter of March 15, 1947 (157; Ex. 29).

To satisfy Brewer and because relations were so friendly on June 17, 1947, both parties agreed to put the whole fiscal year from July 1, 1946 to June 30, 1947 on the "dollar for dollar" basis (238). From

July 1, 1947, Brewer was again on the original franchise at his own suggestion (161, 261).

On July 24, 1947, Brewer attempted to resign, effective August 1, 1947, in violation of a 90-day notice requirement in his franchise (163, 308, 308-9). He had given no notice of dissatisfaction (164, 403, 342, 405) and attempted to excuse his action at one time because of "his family" (165) and at another time because he was not on an equal share basis (306).

Fifteen days before his resignation, he made a part payment on his admitted obligation (310; Ex. 36) and 23 days later took the company's property, all its bank balance, its employees, and on August 1, 1947 started serving the same customers of appellant which he and his associates knew were under contract for service with Paramount. In the next few weeks appellees admit taking over 142 of their former employer's customers into their own business (47-50). This was in violation of Brewer's (39, ¶ 31) and Rightmire's (12 (b)) contracts not to solicit or go into the pest control business respectively, for a period of three years after termination of employment. Employees not under contract knowingly joined with those who were, to take Paramount Pest Control business into that of Brewer Pest Control, for which they now all worked (54, 248, 252). This condition gave rise to this litigation.

ERROR NO. 1—DOING BUSINESS IN OREGON

SPECIFICATION. Appellant cites as error the Court's failure to make a finding on a material issue created by the allegations in its complaint describing its business (4) and appellees answer that appellant was not "engaged in the business described, in the State of Oregon" (68 (2) (b)).

ARGUMENT. The question is one of fact. To support appellant's prayer for permanent injunction, it was necessary to prove appellant was not acting *ultra vires* and was authorized to and doing such established business in Oregon.

Exhibit 1 is the California Articles of Incorporation, Exhibit 2 is its declaration to so engage in Oregon, Exhibit 3 is the Oregon Corporation Commissioner's Certificate of Authorization to do such business in said state and Exhibit 4 is the receipt for fees to June 30, 1948 (118).

Appellant trains men in its central office in California to apply chemicals, prepare bait and insert poisons in the right manner and amounts. This training was extensive and unique (117), performed under the more severe laws of California (126). Thereafter its trained men were sent to establish the same business in Oregon, Washington and Arizona (126). Such personnel included Brewer and Duncan (140) who were sent to Oregon (140-1) to do this business. The officials of appellant made periodical visits to Oregon territory (179, 208, 213, 405) and the entomologist in charge

of pests, poisons and processes gave information and instruction over the entire territory from the central office (119-201). Instructions and information were constantly circularized to all employes wherever located (127-133; Ex. 7-26).

The proof shows there was identity in Oregon, with appellant's corporate powers and purposes in California, the same executives operated in both states, the same employes were trained in California who operated in Oregon, with the exception of Merriott who was trained by a California trained man (434), the same poisons, ingredients and methods were used and the one entomologist supervised the work in both states. There was not even a suggestion of evidence by appellees to support their issue that the two businesses were not the same.

Under such a record, appellant had a reasonable expectation the trial court would enter a finding in its favor on this issue. This was the business the court was asked to protect by injunction if other rights entitled appellant thereto. No findings were made thereon as required. (F. R. C. P. 52-a)

ERROR NO. 2—CONSPIRACY

SPECIFICATION. The gravamen of this suit was appellant's charge of appellees' conspiracy to (a) breach the valid written and subsisting *employment contracts* between appellant and (i) Brewer (29-40) and (ii) Rightmire (12), also (b) to seek and acquire the business of appellant in Oregon by interfering with and causing the breach of *service con-*

tracts between appellant and its many customers, and (c) intentionally causing destruction of appellant's business in Oregon. Appellees denied these charges. Material issues were so presented to the court which erred in not making specific findings and separate conclusions thereon (Rule 52-a) and in not deciding in favor of appellant.

POINTS AND AUTHORITIES. 1. A conspiracy is a combination between two or more persons by concerted action to accomplish an unlawful purpose by lawful means or a lawful purpose by unlawful means. *Alaska SS. Co. v. Int'l. Longshoremen's Ass'n.*, 236 Fed. 964; *Spaulding et al v. Evenson et al*, 149 Fed. 913; *Heitkemper v. Central Labor Council*, 99 Or. 1; *Dowdell et al v. Carpy et al*, 129 Cal. 168.

2. Civil liability rests on proof of something done by one or more of the conspirators in furtherance of its object, which resulted in damage to complainant. The overt act and the damage are the gist of the civil action. *National Fireproofing Co. v. Masons Builders' Ass'n.*, 169 Fed. 259; *Motley, Green & Co. v. Detroit Steel & Spring Co. et al*, 161 Fed. 389; *Alder v. Fenton*, 16 L. Ed. 696.

3. Liability is established by proof of showing concerted action from which the natural inference arises that the unlawful act was in furtherance of a common design, intention and purpose. *Calcutt v. Gerig*, 271 Fed. 220.

4. Any person entering a conspiracy already formed is deemed a party to all acts committed by

other conspirators, if done with knowledge and in furtherance of the common design. *Jayne v. Loder*, 149 Fed. 21.

5. A conspiracy to cause a breach of contract is an unlawful one. *Hitchman Coal and Coke Co. v. Mitchell*, 245 U. S. 229; *Motley, Green & Co. v. Detroit Steel & Spring Co. et al*, 161 Fed. 389; *Sorenson v. Chevrolet Motor Co.*, 171 Minn. 260; *E. L. Hustling Co. v. Coca Cola Co.*, 205 Wis. 356.

6. Repudiation is where one party to a contract refuses to perform the remaining obligations except on material modification. It must be a present, positive unequivocal refusal. *Jordan v. Madsen et al*, 69 Utah 112; *Holden & Martin v. Gilfeater*, 78 Vt. 405; *Atkinson v. District Bond Co.*, 5 Cal. App. (2d) 738.

7. The renunciation of a contract by the promisor before the 90-day period stipulated for notice is not effective unless accepted by the promisee. *Peeler v. Tarola Motor Car Co.*, 170 Or. 600; 12 *Am. Jur.* "Contracts" § 448; p. 1030.

ARGUMENT. 1. Conspiracy—Facts; Employment Contracts:—

(a) Brewer's franchise (Ex. 1 attached to the complaint, Ex. 27 in evidence) (29) is the basis of one theory of unlawful conduct. He admits the franchise as genuine with a modification (45) not involved on this point. He testifies that he signed it and believed it "binding and valid" (471). He

had received and read the contract in Oakland, before he came to Oregon (407). Paragraph 31 provides that Brewer shall not solicit or cater to any of the customers of the company whom he had known because of his employment (39). This section and all the franchise, except Section 5, was and has always remained the agreement between the parties without change.

(b) The contract of Rightmire to refrain from competitive service was pled (12) (Ex. 7) and admitted (68). He claims it was written with a partnership (56) but as such it was later assigned to the appellant corporation (Ex. 28) and never denied as a contract between him and appellant. Carl Duncan's contract (Ex. 8) followed the same course.

Customers Service Contracts:—

In addition to the above employment contracts there are admittedly many service contracts with customers in Oregon whom appellant was serving. These were all on "Service Order," a form of contract (Ex. 11). Most were on an annual (Ex. 54), others on a monthly basis (Ex. 55). Others were verbal or "one shot orders" (6). Appellees admittedly knew them, were ordered to serve customers named therein periodically, did so and reported to appellant, but after the conspiracy, served them and reported to Brewer's Pest Control (427-9, 439). In appellees' answer (46-50, 53, 54, 57) all admit taking and serving 142 Paramount accounts in var-

ious parts of the state (301). Actually the number is much greater (64). When appellant promptly on August 1, 1946 called on these accounts, some were already served by Brewer (348) who did not attempt to terminate his contract until July 31, 1946 (16) and whose agreement provided he would not solicit or serve appellant's customers for three years after the termination of his employment (39).

The pest control business initiated, financed and manned by appellant, it endeavored to reestablish after August 1st and found that some former customers preferred to remain with Brewer's Pest Control because it was the personnel and service they previously knew (297, 423). In addition to the 142 admitted accounts, they acquired others until, based on their commercial piracy of appellant's established business, appellees were able to carry on their own.

Appellees knew of appellant's customer contracts as well as the contents thereof because such were brought to their knowledge by virtue of their work for appellant and also by the service of the complaint in the state suit as that action was finally pled (465) which appellees stipulated "involves the same matters involved here" (413). Appellees were willing to go on acquiring Paramount business notwithstanding they knew their acts violated appellant's customer contracts and their own agreements (430, 439). The conspiracy is proven by the above description of what the appellees did.

Individual Participation:—

There were five conspirators: *Duncan* was appellant's field instructor (140). His conduct can be proven as part of the conspiracy. He was employed by appellant since 1942 and being a good teacher (167), he was sent to Oregon to instruct Brewer, by whom he is now employed (140, 463) and with whom he stayed (455). He was a fugitive from process (168, 463), a defendant in the state case, and the trial court refused to continue his case but of its own motion dismissed it without prejudice (467). He, with Mrs. Brewer, made a five cent bet in endeavoring to get another employe to join their conspiracy (357).

Rosalie Brewer is "the family" to whom Brewer referred (165). They own the pest control business together (311, 499). She came to Oregon with her husband, helped him in the office, posted the books (219, 440, 441) set up by the company (209), did office work and answered the phone (341); wrote checks (448), carried on correspondence (450) and, as she expressed it, "helped whenever he needed it" (442). She aided Brewer in falsifying state records regarding the assumed business name (Ex. 45, 46, 47, 48) (18).

Rightmire made the agreement alleged in the complaint (12) (Ex. 7). At first he had little knowledge of the business, was hired by Brewer and Sibert (415) in 1946 as a service man (141). He had good training under Duncan (273, 425-6), was solicited (422) and went to work for and is associated

with Brewer in the same business (426) since August 1, 1947 (291, 565) in eastern, western and southern Oregon and Idaho (424). The same detailed reports and methods he performed for Paramount in connection with their contract accounts prior to August 1, 1947, he now performs for Brewer Pest Control (427-8), in Oregon and Idaho (431) and is paid weekly (423). He admits he is now serving the same customers for Brewer Pest Control and he "solicited all potential business in every town" (433). His and Brewer's names appear on service slips of former Paramount customers as early as the 3rd and 4th of August, 1947 (245).

Merriott was never in the pest control business before he was employed in February, 1947 by Brewer who, contrary to his franchise, did not require him to sign the employees' non-competitive contract (168). He went to work with Rightmire (434) and worked until July 31, 1947 for Paramount (435) and had heard "something" previously of Brewer breaking with Paramount (436). He works for Brewer for a weekly wage (438) and serves the same customers for Brewer as he served for Paramount and solicited new potential business, including those he knew were under contract with Paramount (54, 439).

Brewer had no previous pest control service or knowledge (135) (Ex. 15). He came into the Oakland office and applied for work (142; Ex. 15). He had a short training in California (143, 177), then trained under Duncan in Oregon (140). He inten-

tionally concealed from appellant that he was going into a competitive business (245, 315, 405-6) until the third of August, 1947 (245). He did the following things to take over appellant's business: (a) Though he says somewhere between June (318) and July 25th (501), not later than June he determined to go into his own business. During that time, while concealing his ultimate purpose, he compiled with Hilts the June accounting (Ex. 36) and secured a reduction in payment, and voluntarily made a part payment of \$259.61 thereon (Ex. 37. (b) On July 7th, he admittedly (313-5) placed his order for 5000 service contracts, 2000 service orders, 2000 receipts in duplicate, 1500 business cards with the telephone numbers thereon (246) and on July 11th, 2000 statements (325), all delivered July 14, 1947, on forms prepared by Brewer from those used by Paramount (316, 327) and paid for them (Ex. 64-66), then notified Paramount on July 24th he was leaving their service (502, 303, 310-311). (c) He collected outstanding accounts (342), drew \$1,017.00 from the bank (236, 384), leaving a \$4.00 balance (384). He attempted to prevent company representatives from seeing Rightmire (243), yet testified he made no definite arrangements about going into business for himself until August 1, 1947 (319, 321). (d) Admittedly he and his wife owned Brewer Pest Control business from July 30, 1947 (311). With his wife, not under contract with appellant, he filed a certificate of assumed business name on July 30, 1947 (Ex. 46), falsely asserting

she alone owned the business (496). She did this because Brewer was "busy working" (497, 312). Encouraged in this commercial piracy by the dismissal of the state case, Rosalie Brewer filed a Certificate of Retirement August 27, 1947 (Ex. 47), falsely asserting she had no interest in the business. Concurrently at that time Brewer filed a Certificate of Assumed Business Name (Ex. 48) for business located in his home (344), falsely certifying he was the sole owner (312, 496-7). His excuse for not including his wife's name is "we did not consider it necessary" (312). Their conduct was not only contrary to statute (4 *O. C. L. A.* § 43-501), but a misdemeanor (4 *O. C. L. A.* § 43-507). On July 30, 1947, Brewer and wife said they were going into competitive business for themselves, taking all Paramount employees with them (341) and all employees thereupon left Paramount (248, 341). They were hired by Brewer on August 1, 1947 (169, 291, 320). No one but Brewer gave notice of leaving. To Paramount, it was a "big surprise" (169), "a bombshell in our camp" (241, 345) and Paramount "was dumbfounded" (406), but thought they were the "best of friends" and those relations "were going to continue" (183). Appellees hung up service cards (Ex. 40-b) like Paramount's (Ex. 40-a; 328). Brewer declared they would have Paramount's equipment, stock, experienced personnel and it would be months before the company could regain its status (343). Customers could call Brewer's Pest Control men individually (321).

Overt Acts are too numerous to mention except by classification. They include, but are not confined to solicitation and serving of each one of appellant's contract customers (506, 349), soliciting other employees to join the conspiracy (357), withdrawal of money (342, 385), undenied by Brewer (454), taking equipment and supplies (344) and office records (367) and filing false records (Ex. 46-8).

Damages: To be actionable, a civil conspiracy must cause damage. (See Error No. 4, p. 32 *infra*).

2. Conspiracy—Law:—

The above acts are admittedly voluntary. The law presumes each conspirator "intends the ordinary consequences of his voluntary act." *O. C. L. A.* § 2-407 (3). The acts were done "wilfully" because of "a purpose or willingness to commit the acts." *O. C. L. A.* § 23-108. They were done to " * * * vex, annoy or injure another * * *," and were therefore maliciously done (*O. C. L. A.* § 23-111), and "a malicious and guilty intent" is conclusively presumed "from the deliberate commission of an unlawful act, for the purpose of injuring another." *O. C. L. A.* § 2-406 (2); *Hitchman Coal and Coke Co. v. Mitchell*, 245 U. S. 229.

The employment contracts of Brewer and Rightmire, wherein said employees agree to refrain from either solicitation or competitive service, are admitted as executed and genuine and are legal contracts. They have a reasonable limit of time (three

years) and of space (the State of Oregon) and as such receive legal sanction (17 C. J. S. 622, § 240). *Columbia Tent & Awning Co. v. Thiele*, 135 Or. 511. The trial court refused to find Brewer's franchise was "not fair and reasonable" and crossed out appellees' proposed finding to the contrary (76). The question of fairness or reasonableness was only a verbal attack in this case. There was no pleading to that effect. Brewer had for periods of time performed his contract and made payments thereunder (214-222).

This case fits the legal pattern of an unlawful civil conspiracy. It is a combination of five people associated under the assumed business name of Brewer's Pest Control Service who, by the unlawful means of violating or aiding the violation of personal contracts not to solicit or serve appellant's customers, concert their joint and several action not only upon soliciting, procuring and serving former customers of appellant in violation of their personal contracts, but also as third parties solicit, aid or effect the violation of legal contracts of service between appellant and its own customers. No formal agreement is necessary for a conspiracy, a tacit understanding is sufficient, nor is it necessary each conspirator have knowledge of the details or the means to be used, or that the agreement be enforceable (*Alaska SS. Co. v. International Longshoremen's Ass'n.*, 236 Fed. 964, 969), although all these elements are clearly proven herein. The case can be prosecuted without Duncan being served

(*Spaulding et al v. Evenson et al*, 149 Fed. 913).

The acts of these appellees are not lawful competition, but are to suppress competition by breaking customer contracts and destroying appellant's lawful business (*Spaulding et al v. Evenson et al*, 149 Fed. 913, 919). There is a natural inference which arises from their acts that all was done in furtherance of a common design, but here appellees admit a common design to build up business for Brewer Pest Control by soliciting all potential business (*Calcutt v. Gerig*, 271 Fed. 220, 222). This included appellant's contract customers.

All that is needed to make this conspiracy an actionable one wherein an injunction will issue is (1) the commission of overt acts, necessary to put the conspiracy into effect, and (2) that damage result from the combination or conspiracy (*Nat'l. Fireproofing Co. v. Masons Builders' Ass'n.*, 169 Fed. 259, 265).

Appellees attempt to make some point of their claim that all appellees did not enter this conspiracy on August 1, 1947. The undenied proof is that all entered the combination sometime during August; they did so with knowledge of the contractual relations involved because served with summons and complaint in the state case "the same as here." They also after entry confessedly promoted the common cause. This makes them all liable, irrespective of the actual date of employment (*Jayne v. Loder*, 149 Fed. 21, 30).

Appellees' defense to the charge of unlawful conduct has been confined to the claim that the franchise of Brewer was repudiated by appellant. That defense is hereinafter disproved. But there is other unlawful conduct. Appellees make no defense, but on the contrary, boast they solicited the appellant's customers under contract for service, and admit acquiring at least 142 of such accounts. In such solicitation and service each conspirator was an agent for all, so the act of one was the act of all (*Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 249), and contracts are legal property and entitled to be protected in their enjoyment, and this is true even though the service was for "one shot," or at will (*Hitchman* case, 245 U. S. 229, 251). The pecuniary value of the reasonable probabilities of performance and profit are recognized in law (*Hitchman* case, 245 U. S. 252).

Even if the charge of conspiracy should fail, the unlawful conduct of appellees would entitle appellant to an injunction (*E. L. Husting Co. v. Coca Cola Co.*, 205 Wis. 356).

3. Alleged Repudiation of Brewer's Contract:—

In this case there are two kinds of unlawful acts: (1) The breach by the conspirators of their own contracts of *employment*, aided by the non-contracting employees; and (2) the coordinated action of all conspirators to nullify the customers' *service* contracts of appellant.

To appellant's charge of conspiracy against

these appellees intending to break the service contracts between appellant and its many customers, appellees neither plead nor claim any defense. To the contrary, appellees admit taking 142 of their former employer's accounts by their solicitation and service. On this ground alone it would appear that an injunction should issue.

To appellant's charge of conspiracy between former employees violating their own and other employment agreements, there is no defense pled by Rightmire, other than he made his contract with the partnership. He imposes no defense to the fact that Exhibit 28 discloses this contract was assigned by the partnership to the corporation.

To appellant's charge of conspiracy against Brewer to break his franchise agreement, Brewer pleads the simple defense of repudiation in the following language: " * * * because of the plaintiff's repudiation by the plaintiff (*sic*) of the contract as modified, the defendant Charles P. Brewer wrote his notice of resignation as set forth in Paragraph numbered V of the complaint."

(a) The following *facts* disprove any repudiation of the franchise by appellant:

The contract, with the exception of Paragraph 5, was never denied or rendered ineffectual by either party and Section 5 (474) was the only one where a modification as to amount of payment was made. Therefore, the contract as a whole was never repudiated by either party up to the date of Brew-

er's letter on July 24, 1947. President Sibert, Secretary-Treasurer Hilts and Agent Brewer alone (153, 230) met in Portland on June 17, 1947, and went over the books of Brewer's agency (154, 230, 159). Agent Brewer admits at that interview he agreed to carry on the business for the month of July (315). There is no issue but what the franchise was originally in effect (471). Now the only issue is: Was § 5 of the original franchise revived in June, 1947? Brewer admits the franchise was revived in June because he claims that he told Sibert and Hilts he would continue during July (315).

With a \$3,000 per month business (147, 154, 230) Agent Brewer had a sufficient profit to go on the franchise. Brewer's own evidence, Ex. 77, (Tr. 82) shows a gross business sales of \$33,394.30. Brewer claims that this exhibit was introduced as a means of his borrowing money from The Bank of California, but admits that he never borrowed any money (284). After the June audit, business was on an "even keel" and no mention was made of dissatisfaction (229, 242) nor any mention of terminating Brewer's relationship and no indication from him of any different payment than that which was then agreed upon (231). His franchise was now better for him and it was his suggestion that he go back to it (154, 161, 233). Relations were so friendly (160, 161, 164) that Sibert bought the airplane tickets for Brewer and his daughter to go South to Mrs. Brewer (162), and they stayed at the Sibert home four or five days and left good friends (162).

Brewer's slogan for his business was "The Best in the West" (405, 164). He also admits no modification of this contract nor of any of its terms, except that part of Section 5 which provided for an 80-20% distribution when he wanted a 50-50% division of the profits. In giving Brewer's reason for cancelling his franchise, Brewer says Paramount's refusal to give the 50-50% distribution was the "entire reason—there was no other" (306). Brewer denies many of the foregoing statements, but there are several circumstances which disprove his position and do prove that it was Brewer who repudiated the contract and not appellant. He further admits that when the contract was modified it was not on a 50-50 basis, but on the basis that when Paramount got a dollar, he was to get a dollar (475, 307) and that he was going to pour back into the business what he did not need for himself and the equal payment to Paramount (308).

The circumstances refuting Brewer's claim of appellant's repudiation and establishing Brewer's repudiation are as follows:

(1) If Brewer had notified Paramount in June or July, 1947 as he claims, that he was through with Paramount (315, 452) if they did not give him a 50-50 division of profit and Paramount knew they were not and would not give him such division, *why would Paramount not have prepared to take over the business?* In place of that they were stunned and struggled to get back on their feet (242-249, 377) after Brewer took the bank account, men, supplies and equipment.

(2) Brewer, in spite of his other statements to the contrary, admits he gave no declaration or notice that he was through with Paramount, except his letter of July 24th (Ex. 42), received by Sibert on his vacation (165), when he says, “* * * if I gave them 90 days (notice) they (Paramount) would move in here with a dozen men and take over possession of everything in sight, and I would be left sitting here broke” (308). He says he knew of the 90-day provision and purposely avoided it (308). This same reasoning applies to his claim that he gave such notice in November, 1946 (475) and in March, 1947 (478). The alleged defense of repudiation rests on Brewer’s testimony alone. His said claim is in direct contradiction to the testimony of Sibert, Hilts and the circumstances of the case as herein recited. It is presumed that when the law says there must be some testimony to support any proposition, that at least under equitable principles enforceable in a court of conscience, it must be testimony worthy of belief to the extent that the court can with confidence predicate its decision on that testimony.

(3) Since Brewer must take the heavy burden of establishing repudiation and attempts to do so by his testimony alone, it is relevant and material that we inquire into his integrity as disclosed by the facts in this case. The following indicates that he is to be distrusted in his testimony. If any one of the following instances appeal to the court as one in which Brewer falsified his evidence, then under

the statute "a witness false in one part of his testimony is to be distrusted in others." (*O. C. L. A.* § 2-1001 (3)).

Examples of falsification are: (a) Brewer swore he determined to go into business for himself between the 20th and 25th of July, 1947, and that he devoted every minute of his "best efforts to Paramount Pest Control business up to August 1st" (289, 315). Yet the record shows he placed his order for all the above mentioned business supplies on July 7, 1947 (314, 324, 330) and admits if he placed these orders, he would be going into business for himself (315). (b) He claims he did not recognize the franchise after January 1, 1947, yet he delivered three checks bearing that designation as payment thereon (Ex. 30-35) and in another place he says he made them "on the original franchise basis" (490). (c) He claims he bought poison No. 1080 from the Government Department of Fish and Wild Life in August, 1947 (294-297) and the Deputy Agent of the Department says he could not (331-338). (d) He admittedly falsified public records connected with his assumed business name (Ex. 45-48, inc.). (e) He claims he paid for the air trips South in June, 1947, by certain checks (289). This was at the same time he claimed he notified Paramount officers he was quitting (315, 452), but the trip was arranged by Sibert (162, 385), paid by Paramount (385), and one of the three checks he says he used, was for tires (385) and the other drawn after he left Portland (385). (f) He claims

he was practically "forced under duress to sign the franchise in July, 1946" (302), yet stayed on for over a year in what his wife at least described as "friendly" relations down to the time of Brewer's resignation letter of July 24, 1947 (449), yet he had read this contract and had it for two days before he came to work for Paramount (144) on February 2, 1946 (143, 145) and knew of the franchise for six months from February to July, 1946 (145). (g) The undenied statements of appellant's witnesses that Brewer said they were leaving and would be the worst "so-and-so's" in the world as of August 1st, shows they saw themselves through other eyes (341).

(b) The *Law* has certain specific requirements for proof of repudiation: "★ ★ ★ where one party to a contract refuses to perform except on a material modification or addition of new terms, such conduct amounts to a repudiation." *Jordan v. Madsen et al*, 252 P. 570. It must consist of a present, positive, unequivocal refusal to perform the contract and a mere threat alone to abandon is not repudiation. *Gold Mining and Water Co. v. Swinerton et al*, 23 Cal. (2d) 19. Here the evidence worthy of belief shows decidedly there was a present, positive and unequivocal agreement to continue the franchise on the part of Paramount until Brewer's letter. At no time did appellant make a present, positive and unequivocal refusal to perform as required in *Atkinson v. District Bond Co.*, 5 Cal. App. (2d) 738.

It is reasonable to assume from the evidence that Brewer felt himself firmly enough entrenched to send his letter of July 24, 1947 (16) and to continue to serve Paramount's customers. All this he actually did. The one point on which he miscalculated was his failure to realize his old friends would actually institute legal proceedings against him to protect their business.

Assuming, for the sake of argument only, that Brewer is correct when he claims he was willing to go on with the franchise on a 50-50 split of profits, then such was a conditional renunciation, and renunciation of a contract by the promisor is not effective *unless such repudiation is unequivocally accepted by the promisee*. 17 *Corpus Juris Secundum*, "Contracts," § 472 (3) p. 978. Brewer does not testify that his repudiation was accepted by Paramount and where he repudiated without complying with the contract requirement of 90-day notice, there could be no repudiation by appellant. The requirement of a contract as to notice—as to the time of its giving, its form and the manner of service thereof—must be strictly observed in cancelling the franchise; there must be exact compliance with such provisions. 12 *Am. Jur.* "Contracts," § 448, p. 1030. There was no compliance with the time of notice (163), and Brewer's letter of July 24, 1947 (16) was ineffectual for anything except to act as his own repudiation of the franchise.

Appellees made some contention that they were not all employed as of August 1st and that they re-

ceived simply a weekly wage (423, 438). These matters are entirely immaterial because any person knowingly entering a conspiracy already formed is deemed a party to all acts committed by the other conspirators. Each conspirator, by the service of the complaint in the State case, was made fully aware of the conspiracy. Whether he received a weekly wage or a division of the loot in the rapine of plaintiff's business, is likewise immaterial as long as he damaged appellant thereby. It seems conclusively established that there was a conspiracy in which all the appellees joined. When Brewer did not comply with his contract with respect to notice, he on the 24th of July repudiated his agreement and the others joined in the unlawful purpose to the damage of the appellant.

It seems proven beyond doubt that these appellees combined, if not by specific agreements, then by concerted action, to break their own employment contracts and those service agreements between appellant and its customers. They knew this concerted action would and intended it should cause damage to appellant (341-343). Although this conspiracy was the gravamen of appellant's complaint (13), and an issue between the parties, the trial court made no specific finding or conclusion, or any finding or conclusion on this issue as required by rule. (Rule 52 (a)).

ERROR NO. 3—EQUITABLE REMEDY— INJUNCTION

SPECIFICATION. The trial court erred in not (1) enjoining the appellees' unlawful conspiracy and interference with appellant's contract customers, (2) invoking upon certain individual appellees the prohibitions which they had invited by virtue of their employment contracts (12, 29), and (3) invoking equitable remedies, since damages were inadequate, not capable of determination, and there was necessity for the avoidance of a multiplicity of actions.

POINTS AND AUTHORITIES. Rights to perform contracts and reap the profits therefrom and the right of performance by the other parties thereto, such as appellant's customers, are property rights and entitled to equitable protection. 84 A. L. R. 43-100, Note.

Equity will enforce covenants in partial restraint of trade and are upheld by the courts when made by an agent or employe to prevent competition with his principle or employer after the expiration of service when such restrictions are reasonably necessary to protect the employer from business loss. *Donohue v. Peterson*, 161 Or. 65; *Thompson Optical Institute v. Thompson*, 119 Or. 252.

Equity will enjoin when damages are inadequate or uncertain and to avoid a multiplicity of actions. *Bernard v. Willamette Box and Lbr. Co.*, 64 Or. 223; *Roots v. Boring Junction Lbr. Co.*, 50

Or. 298; *Phez Co. v. Salem Fruit Union*, 103 Or. 514.

ARGUMENT. It would be unthinkable if having established the unlawful conduct of these conspirators, the law could afford no remedy to protect a business which had taken so much hard work to establish and which had unique features in poisons and their application as described by appellant's entomologist (184-205). This specification of error describes those remedies and charges the trial court with error in failing to invoke them.

(a) REASONS OF TRIAL COURT REFUTED. Apparently the trial court agreed with appellant in many of the positions it assumed, but denied the remedies and assigned but two reasons for its refusal to invoke them.

1. When this suit was filed October 22, 1947, appellant concurrently moved for a temporary restraining order (41). Promptly after appellees' answers to interrogatories were filed (45-66), a hearing was had November 18th. The court denied the motion "until there is disclosure in more detail of the secret nature of the processes * * *" (66).

The "secret processes" were facts in the case, but immaterial on the matter of issuing an injunction. Where admitted contracts of employment and service were admittedly violated, a court of conscience was entitled to enjoin the unlawful conduct. Such was true whether the business involved secret processes or all its phases were open to the public. The gist of injunctive relief rested in the violation

of valid and existing contracts. Secrecy was no necessary requisite to secure injunctive relief.

2. With the court's assurance of an "early pre-trial and trial date" (66), no appeal was taken from the denial of a temporary injunction. Delay occurred in order to suit the convenience of appellees and a burdened trial court. Pre-trial was had December 26, 1947, and trial on January 20 to 23, 1948, and an opinion rendered on January 30th. It is reasonable to assume the trial court felt the urge for appellant's relief when it said, "I would not think I should enjoin defendant generally from re-engaging in the pest control business; but if this were August, 1947, I would feel that defendant should be restrained from any business with plaintiff's former customers, as Customer Lists are protected by the law" (73). It seems equally apparent that the only reason why the court did not so enjoin appellees was because "Considerable time has gone by and the interest of 140-odd third parties who have continued service with defendants has to be kept in mind. So an injunction will be denied."

(73). The actual time after appellant qualified to sue in this state on August 25, 1947 (Ex. 3; 118) and the filing of this suit on the following October 22nd, was fifty-eight days, and was occupied with investigation; preparation of the case and the filing of the pleadings herein. Such was not an unreasonable delay because the violation of appellees was at first slight and later definitely progressive. An analysis of Exhibit 54 shows there were cancellations

of the contracts for one year as follows: 36 in August, 9 in September, 40 in October, and of the 36 cancelled in August, 20 were on or after the 15th. All these customers were under contract with appellant. The trial court's statement that these "140-odd third parties have continued service with the defendant has to be kept in mind" (73), does not take into consideration that said customers violated their contracts undoubtedly at the instigation of appellees, and definitely no court approval should be given the commercial piracy of the appellees or the unlawful breach of contract by illusioned customers.

(b) **CONTRACTS PROTECTED BY EQUITY.** Even if appellant's employes were under no contractual obligation, the law would prevent a conspiracy to and a breach of appellant's customers' service contracts by appellees. These customer contracts call for a continuing service over a period of time, varying from one to twelve months, with an average of over six months to run. These contracts were appellant's property, gained from active service, experience, time and expense and protected from commercial piracy. The trial court must have overlooked the fact that all these contracts were not broken on August 1st, nor did the activity of the conspirators all appear to appellant as of that date. Appellees could not solicit so many customers on that particular date, but this was an active progressive piracy, continuing for several weeks.

There has been no change in the circumstances

of the parties as would bring this cause within the rule of a lost remedy because of laches. *E. L. Husting Co. v. Coca Cola Co.*, 205 Wis. 356, 371.

Rights in customers and employees contracts were property from which the appellant was entitled to receive its profits. That principle is well established. Appellant does not here elaborate upon the authorities. The note in 84 A. L. R. p. 43 *et seq.*, contains a list of federal and state authorities, as well as of England. It is so complete in its declaration of support for the relief here sought, that to reiterate the authorities or their holdings would occupy unnecessary space in this brief devoted to particular issues also presented at the trial.

ERROR NO. 4—LEGAL REMEDY—DAMAGES

SPECIFICATION. The trial court erred in failing to award appellant a monetary judgment upon certain specific proven contract obligations against Brewer and certain specific items of damage against all appellees.

POINTS AND AUTHORITIES. Compensatory damages may be recovered. *Nalle v. Oyster*, 230 U. S. 165; *E. L. Husting Co. v. Coca Cola Co.*, 205 Wis. 356; 1 *Sutherland* "Damages," 4th Ed. § 78, p. 283; 11 *Am. Jur.* "Conspiracy," § 57, p. 587.

In Oregon the rate of interest is 6% on all monies after the same become due. *O. C. L. A.* § 66-101.

All conspirators may be joined as particular de-

fendants in an action for damages caused by their unlawful acts. *Clein et al v. City of Atlanta et al*, 164 Ga. 529; 11 *Am. Jur.* "Conspiracy," §§ 53, 54, p. 584. The liability is joint and several. *Lynes v. Standard Oil Co. et al*, 300 Fed. 812; *Fountain Spring Park Co. v. Roberts et al*, 92 Wis. 345. Interest is the ordinary incident for non-payment of obligations and compensation is a fundamental principle of damages. *Prager v. N. J. Fidelity and Plate Glass Ins. Co.*, 245 N. Y. 1. Interest must be allowed as an incident to "just compensation" where property has been taken. *United States v. Rogers*, 255 U. S. 163; *Prager v. N. J. Fidelity & Plate Glass Ins. Co. (supra.)*

ARGUMENT. In addition to injunctive relief, appellant asked for a monetary judgment on the basis of contract obligations from Brewer and damages in tort from all appellees.

1. CONTRACT OBLIGATIONS: The following sums are due under Brewer's contracts:

(a) On June 17, 1947, Sibert, Hilts and Brewer met in Portland (158, 159, 230). They agreed upon an accounting running from July 1, 1946 to June 30, 1947 (231). Brewer's books (159-160) showed he had over \$3,000 per month business and could keep his franchise, pay his bills, operate his territory and have \$855.00 per month for himself. He concluded, and it was his own suggestion that he go on the franchise (161). It was also Brewer's suggestion that they extend the "dollar for dollar" basis

for the fiscal year above mentioned (238). Hilts prepared a statement (Ex. 36) (230, 236, 237, 241, 242) on that basis. Brewer helped make this compilation. The figures were from his books and Hilts explained the method of making the accounting (230-242). Brewer agreed the amount due was \$3,359.61, of which he paid \$259.61 on July 9, 1947 (Ex. 36, 37, 38) (242). He entered this payment on the accounting in his own handwriting (242, 310; Ex. 36).

The balance of \$3,100.00 Brewer promised to pay (241), but never paid (373) and demand was made therefor (Ex. 56). He admits between \$2,500 and \$3,000 was due (460). In the last few moments of trial he offered an accounting, conceding that there "might be a mistake some place" in this accounting (460). Appellant made objections thereto which were sustained (465). This \$3,100 is definitely due.

(b) The next contract obligation is for \$478.15 under the original franchise for the month of July 1947 (Ex. 39). After the June accounting (Ex. 36) Brewer wanted to and agreed to go back on the franchise payments (161, 233, 261). He admits he was to carry the business during the month of July (500, 318). The amount for distribution was \$2,390.75 and the 20% due the company was \$478.15 (392). Brewer does not question the amount.

(c) There is the amount of \$973.30 (Ex. 50) due on fixed assets not turned in as per contract (305).

(d) There is a claim of \$925.89 for unsupported expenditures (Ex. 51; 375) and no effort was made by Brewer to support these items that he claims were for business, by voucher or supporting evidence (375, 392). He admits their withdrawal and alleges they were "for business," but does not say whose business (475).

(e) The sum of \$678.50 (Ex. 51 (a)) was for one-half of the income derived from the Eastern Oregon run for business for the months of February, March and April, 1947 (376). Brewer asked for this help and the agreement was that Paramount would send men into Eastern Oregon, pay their expenses, get more business, and Brewer and Paramount would share the profit or loss and expenses (150-2). Paramount paid the expenses and Brewer collected and kept the profits. The expense is included in Ex. 36 and said sum is due from the profits (376).

2. TORT OBLIGATIONS: The following sums are due jointly and severally from the appellees:

(a) Appellant's business is a personal service, built on organization and experienced men and poisons and inert ingredients (377 *et seq*). When Brewer Pest Control made the coup to take all Oregon business, appellant sent men from other localities into Oregon to try and save it. Exhibit 53 is a statement of \$3,596.95 paid to these men (379) and is an expense allocated solely to salvage operations caused by appellees' conduct. Appellee's cross-examination

to the effect that this included Paramount's employees at regular salary (393, 394) is immaterial. But for appellee's conduct, these men would have been engaged in their regular duties.

(b) Exhibit 54 represents contracts, which were all on Paramount's form (Ex. 11), of customers having an original term of a year or some part thereof yet to run, which customers appellees caused to desert appellant and do business with appellees. This amount of \$4,596.75 represents the total sum of money that they would have received out of this business and the amount that appellant would have received on the franchise basis is \$2,849.99 (382) which is claimed here as actual damage and which appellant would have received but for appellee's interference (380-384).

(c) Exhibit 55 represents contracts like those in Exhibit 54 but wherein the original term had expired and they were operating on a monthly basis under the contract terms. The total of earnings from these monthly contracts amounted to \$566.50 (Ex. 55) (383) and Paramount's share was \$351.00 (382). Exhibits 54 and 55 represent 185 accounts taken by appellees who confess taking 142 thereof (391, 47). All these cancellations were, by appellant's officers, carefully segregated and those due to Brewer Pest Control listed (395).

3. LAW. Since appellant has an exclusive right in Oregon to service its contract customers with its equipment and poisons and by its methods, it is

entitled to injunctive relief against the breach of its express and implied negative covenants and against service of its customers by former employes (*E. L. Husling Co. v. Coca Cola Co. et al*, 205 Wis. 356).

But in addition, these appellees have maliciously induced appellant's former customers to breach their contracts of service. They are therefore jointly and severally liable (*Lynes v. Standard Oil Corp. et al*, 300 Fed. 812, 815) for damages resulting from the breach.

Under the above authorities, damages are recoverable on a compensatory basis and all conspirators are jointly and severally liable for whatever damage their conspiracy caused in an amount that will compensate the appellant. The legal rate of interest in Oregon is 6% and interest is allowable on damages when the amount is so definite and certain that the court can say that appellant lost the use of that money for which interest is to compensate. Such interest is acknowledged on all items in accordance with the exhibits evidencing the obligations and the date from which they were due.

IN CONCLUSION, appellant has shown it brought to Oregon, a business to better public health and welfare and established it by personal sacrifice, great labor and much money. It sought to protect its investment by contracts with both employes and customers. As employes, appellees occupied a

unique position because they were the only personnel known to the customer who paid direct to appellees for their service.

Obviously goaded by avarice, the employes became disloyal, ignored the contracts, and sought and acquired a very substantial part of appellant's Oregon business. Appellant asks this court to prevent the continuance of this wrong and compensate for injury done. "A faithful man shall abound with blessings, but he that maketh haste to be rich shall not be innocent."

Respectfully submitted,

KENNETH C. GILLIS

and

ROBERT R. RANKIN,

Attorneys for Appellant

In the United States
CIRCUIT COURT OF APPEALS
for the Ninth Circuit

PARAMOUNT PEST CONTROL SERVICE,
a corporation,

Appellant.

v.

CHARLES P. BREWER, individually and
doing business as Brewer's Pest Control,
ROSALIE BREWER, his wife, RAY-
MOND RIGHTMIRE, CARL DUNCAN
and EARL MERRIOTT,

Appellees.

BRIEF FOR APPELLEES

Upon Appeal from the District Court of the United
States for the District of Oregon.

FLOWDEN STOTT,
Yeon Building,
Portland 4, Oregon.

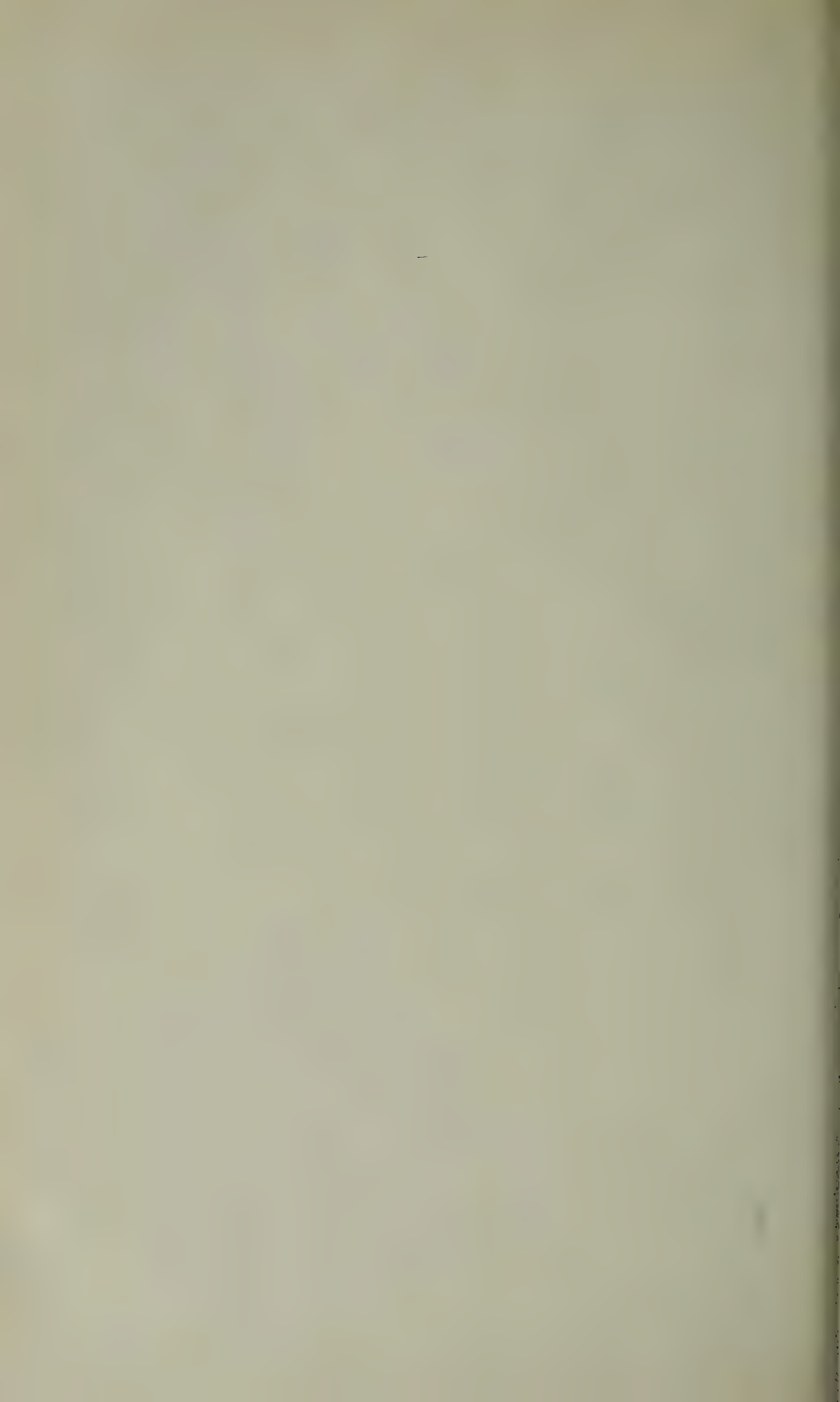
COLLIER AND BERNARD,
Spalding Building,
Portland 4, Oregon.
Attorneys for Appellees.

FILED

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PAUL P. O'BRIEN,

CLERK



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NOTE:

Reference numbers in the Brief without other designation denote pages of the Transcript of Record.

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STATEMENT OF JURISDICTION

The District Court had jurisdiction of this action in the nature of a civil suit in equity between citizens of different states as the amount involved, exclusive of interest and costs, exceeded \$3,000.00. 28 U.S.C.A. Sec. 41.

The Circuit Court of Appeals has jurisdiction of this appeal. 28 U. S. C. A. Sec. 211, 225.

STATEMENT OF CASE

In February, 1946, appellee Charles P. Brewer was employed in California by Paramount Pest Control Service, a partnership. After observing for about a week how bait was mixed and put out for rats, mice and cockroaches, Brewer went out selling by himself for a week and then went out with other men on "trouble checks" to help out and learn what he could (265-266). About two months after entering into such employment Brewer was sent to Oregon to manage the Portland territory. He was promised a salary of \$250 a month and a franchise when the business reached a volume of four thousand to five thousand dollars a month—a sum deemed sufficient to make a franchise profitable to an agent (269, 272). Up to the time Brewer severed his employment with appellant the monthly business had never approximated that sum (272, 273).

In June, 1946, Brewer was told that he would have to abandon the salary arrangement and take a franchise (275, 302). The franchise that was signed gave to the company twenty per cent of the gross income.

The expenses of maintaining the business, namely, wages service, materials and expense service, wages salesmen, commissions, advertising, auto expense—gas, oil and repairs, depreciation, insurance, taxes and licenses, traveling expenses, wages office, bad debts, donations, gas, light and water, legal and accounting, miscellaneous expense, office expense—stationery, printing and supplies, telephone and telegraph, discounts and allowance received, profit and loss on sales of capital assets,

tithing, discounts and allowance paid, interest paid, "together with such other expense as in the judgment of the company should be charged against said business," were to be paid by Brewer (31-32). The company agreed to furnish Brewer such trucks as in its judgment might be necessary for him to start operations (34) and further agreed to pay the premium on a surety bond to the company (39). No automobile was ever furnished (276).

On the franchise basis of twenty per cent of the gross to the company the business was operating at a loss to Brewer (276-277). Accordingly, in November, 1946, the franchise was modified so that the net profits would be divided on a 50-50 basis as long as the franchise was in force (277-278, 306, 308). The trial court found this fact to be true (74).

On March 13, 1947, the auditor for the company told Brewer that he owed \$994.25 for the months of January and February, 1947, an amount arrived at by allotting twenty per cent of the gross to the company. Brewer, thoroughly aroused, gave the auditor a check and told him that he, Brewer, was through (278-279). On Sunday morning, March 16, Brewer received at his home an air mail special delivery letter which re-cast the account so that the net profits would be divided on a fifty-fifty basis (280, Ex. 29). On receipt of the letter Brewer continued to carry on the business.

In the latter part of June, 1947, Brewer was notified that as of July 1, he would have to pay the company twenty per cent of the gross (284-285, 315). The appellant claimed this was done at Brewer's behest and

Brewer claimed otherwise. The trial court found that "the defendant Charles P. Brewer continued the business under the agreement as modified, and about the 30th day of June, 1947, the plaintiff in violation of its agreement repudiated the contract as modified and notified the defendant Charles P. Brewer that he would thereafter be required to pay the plaintiff twenty per cent (20%) of the gross business done by him (75).

On July 24 Brewer resigned his employment (284-285, 315). The company contended that this was done pursuant to a conspiracy. Brewer claimed otherwise and the trial court found as a fact that "because of the repudiation by the plaintiff of the contract as modified, the defendant Charles P. Brewer sent in his resignation as agent to be effective August 1, 1947" (75).

FINDINGS OF FACT SHALL NOT BE SET ASIDE UNLESS CLEARLY ERRONEOUS, AND DUE REGARD SHALL BE GIVEN TO THE OPPORTUNITY OF THE TRIAL COURT TO JUDGE OF THE CREDIBILITY OF THE WITNESSES. (Rule 52, Federal Rules of Civil Procedure.)

ARGUMENT. Where there is a conflict in the evidence the findings of the trial court are presumptively correct and should not be disturbed unless clearly erroneous. The findings of fact are to be accepted as true, and the sufficiency of the evidence to sustain the findings remains the only consideration of the appellate court. An appellate court will not disturb findings of the trial

court based on conflicting evidence taken in open court except for clear error. Though the appellate court may be convinced that the finding could have been otherwise upon the evidence, the findings of the trial court are conclusive, as they have the same force and effect as the verdict of a jury. *Hartford Accident & Indemnity Co. v. Jasper et al.* 9 Cir. 1944, 144 F. 2d. 266, 267. In determining whether findings are supported by the evidence, evidence most favorable to appellees must be accepted. *Smith et al v. Porter et al.* 8 Cir. 1944, 143 F. 2d. 292, 295. Where a trial judge has seen the witnesses, his findings, in so far as they depend upon whether they spoke the truth must be treated as unassailable. *United States v. Aluminum Co. of America et al.* 2 Cir. 1945, 148 F. 2d. 416, 433.

It is admitted that in the latter part of 1946 paragraph 5 of the franchise was changed to provide for a fifty-fifty division of the net profits. The company claimed the change was for the year 1946, Brewer that it was for the full term of the contract. Brewer is corroborated by the speed with which the company retracted in March, 1947, when it attempted then to repudiate the modification. The company admitted that it intended to collect twenty per cent of the gross after July 1, 1947, and offers as an excuse that Brewer, who had been wanting the fifty-fifty arrangement, suddenly desired to go back to the original—ruinous to him—twenty per cent of the gross to the company. A question of fact was thus presented to the trial court and it found that the franchise had been modified as claimed

by Brewer, that in June, 1947, the company notified Brewer that as of July 1 it would not be bound by the contract as modified, and that because of the actions of the company Brewer resigned. These findings negative the conspiracy claimed by the appellant. If it sustained a loss it was because of its own misconduct and inequitable dealing with Brewer.

THE APPELLANT DID NOT DISCLOSE TO THE APPELLEES ANY RECEIPTS, FORMULAE OR SECRET PROCESSES.

There is substantial evidence in the case that the company never disclosed to the appellees any receipts, formulae, or secret processes (265-268, 434-435, 415) and that since going into business Brewer has used no products or formulae of the company (268-269). The trial court found against the appellant on this issue, finding "the plaintiff did not disclose to the defendant Charles P. Brewer or to any of the other defendants any receipts, formulae or secret processes and *at* the defendant Charles P. Brewer has not used in his business any receipts, formulae or processes of the plaintiff" (75).

Trade secret is plan or process, tool, mechanism, or compound known only to its owner and those of its employees to whom it is necessary to confide it in order to apply it to use it was intended. *Briggs v. Boston*, 15 Fed. Supp. 763.

AN INJUNCTION SHOULD NOT ISSUE AGAINST A FORMER EMPLOYEE IF THE EMPLOYER HAS BEEN GUILTY OF INEQUITABLE CONDUCT OR HAS HIMSELF BREACHED THE CONTRACT.

POINTS AND AUTHORITIES. 1. A petition to grant the extraordinary remedy of injunction requires great caution and deliberation on the part of the court. *State v. Beaver Portland Cement Co.*, 169 Or. 1, 20, 124 P. 2d. 524, 126 P. 2d. 1094 (1942); *Putnam v. Coats*, 220 Mo. App. 218, 222, 283, S. W. 717 (1926).

2. Generally, a private employment contract which curtails the right of an employee to practice his occupation in earning his living wherever he may find work to do will not be enforced in a court of equity unless the rights of the employer reasonably need such protection. *Super Maid Cook-Ware Corporation v. Hamil*, 5 Cir. 1931, 50 F. 2d. 830, 831; *Hydraulic Press Mfg. Co. v. Lake Erie Engineering Corporation*, 2 Cir. 1942, 132 F. 2d. 403, 404.

3. The burden is on the plaintiff to show that the franchise is fair, the restrictive covenants reasonable, and that they have a real relation to, and are really necessary for the protection of the plaintiff in the business to which the covenants are incident. *Super Maid Cook-Ware Corporation v. Hamil*, 5 Cir. 1931, 50 F. 2d. 830, 831; *Ridly v. Kraut*, 180 P. 2d. 124 (Wyo. 1947).

4. Reasonableness and fairness of a contract is measured by what may be done under the terms there-

of and not what has been done. *Love v. Miami Lumber Co.* 118 Fla. 137, 160 So. 32, 38 (1935).

5. It must appear that plaintiff has performed all obligations imposed on it by the contract, before it is entitled to injunctive relief. *Wilson v. Gamble*, 180 Miss. 499, 177 So. 363, 368 (1937).

6. Injunction will be denied when it appears that plaintiff's conduct in obtaining the contract was unjust or unfair, or that plaintiff acted unjustly or unfairly under the contract, or that the contract is unjust, harsh, unfair or unreasonable, or that the entire matter appears to be inequitable. *Dutch Maid Bakeries, Inc., v. Schleicher*, 58 Wyo. 374, 131 P. 2d. 630 (1942); *Economy Grocery Stores Corporation v. McMenemy*, 290 Mass. 549, 195 N. E. 746 (1935); *Super Maid Cook-Ware Corporation*, 5 Cir, 1931, 50 F. 2d. 830; *Briggs v. Boston*, 15 F. Supp. 763 (Dist. Court—N. D. Iowa, 1936). *Love v. Miami Laundry Co.* 118 Fla. 137, 160 So. 32 (1935).

7. One is not entitled to an injunction against a breach of contract if he has himself already breached the contract, or has given good cause for the defendant's breach thereof. *Smith Baking Co. v. Behrens*, 125 Neb. 718, 251 N. W. 826 (1933); *Public Laundries, Inc. v. Taylor*, 26 S. W. 2d, 1085 (Tex. Civ. App. 1930); *Seaboard Oil Co. v. Donovan*, 99 Fla. 1296, 128 So. 821, 824 (1930).

8. If an employer prefers to leave himself free to terminate the employment at will in his own discretion

he should not be accorded an injunction to enforce a stipulation that would exclude the former employee from freely engaging in the same business. *Byram v. Vaughn*, 68 F. Supp. 981, 984 (D. C. 1946).

ARGUMENT. The plaintiff sold his home in Oakland, California, and moved to Portland on the promise of a salary of \$250 per month and a franchise when the volume of business was sufficient to make one profitable (269, 272, 275). Appellant says Brewer was to receive \$200 per month and twenty per cent of the gross income (259-260). After Brewer had moved his family to Portland and purchased a home he was told that he would have to accept a franchise or that he was through (275-302).

The contract was harsh. The company reserved the right to cancel the franchise on ninety days notice. In *Byram v. Vaughn*, *supra*, it was said:

"Compliance with a covenant to refrain from competition with a former employer may lead to a serious hindrance and a substantial handicap in one's efforts to earn a legitimate livelihood. It may deprive the employee of the right to pursue a calling for which he is best fitted or of the opportunity to work in his chosen field of endeavor. An employer, who seeks to subject a former employee to such severe and drastic restrictions on his activities, should at least extend to him some assurance of financial security for a reasonable time. Otherwise, the employee may find himself completely at his employer's mercy. Such a result would seem inequitable and at times even contrary to the dictates of humanity. One who seeks to restrict another's freedom of action should be willing to surrender his own inde-

pendence to a corresponding degree. If the employer prefers to leave himself free to terminate the employment at will in his own discretion, he should not be accorded the drastic and far reaching remedy by way of an injunction to enforce a stipulation that would exclude the former employee from an opportunity freely to engage in the same business. These considerations lead the court to the conclusion that unless the contract which binds one not to compete with his former employer, also obligates the employer to continue the employment for a specified term, the negative covenant should not be enforced by injunction."

The contract required Brewer to devote all his time to the business (30), to carry all the expenses of operating (31-32), to pay ten per cent of his net profit to a charitable organization (32), to purchase necessary trucks and equipment (34), to purchase all stock, merchandise, chemicals and materials from the company (34), to "do whatever shall be necessary or required by the company to increase the business of said company (34), to pay for such "advertising matter, contract forms, letterheads and any other printed matter which, in the opinion of the company is necessary in the operation of the business of the agent" (35), to pay for all fire, theft, liability and compensation policies and "such other insurance as company shall deem necessary" (37), to hire only employees satisfactory to the company and to discharge those who were not (38). All rules and regulations of the company, in existence or in futuro, became or would become part of the contract (35), and the company was made the sole and final judge as to whether Brewer was complying with the contract (40).

The inequitable conduct of the appellant in forcing this harsh contract on Brewer when he had scarcely settled himself in Portland would be grounds for a court of equity to deny relief. However, the lower court based its conclusion on findings, supported by substantial evidence, that the appellant had repudiated the contract. Under the authorities cited, this finding required the court to decline to enforce the contract to the benefit of the party who had been guilty of the wrong.

CONCLUSION. The plaintiff was never qualified to do business in the state of Oregon until August, 1947. The business was treated as belonging to Brewer. (82, 282, defendant's Exhibit 77). Neither Rightmire nor Merriott nor Mrs. Brewer was a party to the contract between appellant and Brewer. None of them were under contract obligation to appellant, and Rightmire had been told by appellant's representative that as of July 1, 1946, he (Rightmire) was working for Brewer. None of them had anything to do with Brewer's severing his connection with the appellant.

It is respectfully submitted that the decree of the lower court should be affirmed.

Respectfully submitted,

FLOWDEN STOTT,

COLLIER & BERNARD,

Attorneys for Appellees.



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DUNCAN and EARL MERRIOTT,

Appellees

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE DISTRICT OF OREGON

APPELLANT'S REPLY BRIEF

FILED

APR 20 1948

PAUL P. O'BRIEN,

KENNETH C. GILLIS,
1103 Central Bank Building,
Oakland 12, California

ROBERT R. RANKIN,
710 Yeon Building,
Portland 4, Oregon

Attorneys for Appellant

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INTRODUCTION

This court may desire appellant's position on the matters contained in appellees' brief which for the most part admits the contentions of appellant. Some further statement of the true facts of the case and a brief analysis of appellees' position may be desirable. Naturally, appellees would like to leave the impression with this court that appellant was

running its business in a haphazard way, working against its managers and franchise holders and preventing them from making any money and that Brewer in particular was abused, mistreated and unfairly dealt with in the Oregon territory. The record will show the facts to be directly to the contrary.

ADDITIONAL STATEMENT OF CASE

Appellees' statement of the case is neither complete nor always accurate. In five hundred pages of record there are but two references that are not to Brewer's testimony shown by appellant to be untrustworthy (Appellant's Br. 24).

Mr. Sibert began this business in 1927 (114) and Mr. Fisher in 1935 (399). They made their partnership in 1938 (115), came to Oregon in 1942 (115) and incorporated in 1945 (Ex. 1). They worked sixteen to twenty hours a day (116) and increased their business, and developed two forms of contract known as the managerial and franchise contracts for individuals to handle their business in allotted territory. The managerial form provided a salary of \$250.00 a month, with certain additions when he started a new territory, but when the business in that territory was developed to about \$3,000 a month gross, he was given a franchise (233) under which the agent could make more money.

At the time of this trial, appellant had in existence eight franchise (370) and three managerial contracts (371). Experience showed it cost the

franchise holder forty-five to seventy-five per cent. of the gross business to pay expenses. The average was about 60% (235) which would leave 20% each for the company and the agent. On a \$3,000 a month business, the agent would make \$850.00 and the company \$600.00 (233). No agent, manager or franchise holder had ever gone broke (370). Some franchise operators were making a net of \$6,000 to \$24,000 annually (371). These contracts were identical with Brewer's.

When Brewer came with the company in 1946, he was given both forms to take home and study (401). He wanted a franchise, but it was pointed out it was better for him to start on a manager's contract which he did until July 1, 1946 (403-4). Brewer was treated no different than anyone else holding similar contracts and had he been honest and worked he would have developed a fine business which would have paid him good money through the years. If this was not true, why did he conspire to leave Paramount, take its customers, its employees and immediately go into business for himself? If the business had been as bad as he attempts to claim before the trial court, he would never have gone into it on his own responsibility without the financial backing and good name of Paramount. Obviously he, early in his employment, determined to make the business his own and to build it on Paramount's money. He asked to have the payments changed so that he would only have to pay the company a dollar if he personally drew

a dollar and he could use the rest of the money to develop a business which he intended to appropriate to himself. In contrast to this commercial piracy, Paramount has always been fair in its treatment even to the extent of paying the expenses of the Eastern Oregon development for Brewer's business, one-half of which he agreed to but never paid.

ADMISSIONS IN APPELLEES' BRIEF

1. Of Appellant's Error No. 1: Appellant asks for a finding to the effect that it does in Oregon, the same business that it does in California, as a basis for an injunction to protect that business. The right to the finding is clearly established (App. Br. 6, 7) and there is not one word of denial in appellees' record.

2. Of Appellant's Error No. 4: In Assignment of Error No. 4 appellant points out that it was entitled to a monetary judgment on various accounts upon two bases: (i) contract obligations that have in some instances been partly paid in acknowledgment of the obligation, and (ii) in the other instances, specific statements of damages unpaid. There is no answer to this section of appellant's brief (pp. 32-7). Perhaps appellees feel that a monetary judgment is of little benefit to appellant or detriment to them. Nevertheless, appellant feels its right to such has been clearly established and it claims when equity rightly assumes jurisdiction over a cause for any purpose, ordinarily it retains the cause for all purposes, and proceeds to final examination of the entire controversy and estab-

lishes purely legal rights and grants purely legal remedies therein, and the jurisdiction of equity is tested by the facts existing at the inception of the suit, and in this case an injunction was the dominant relief sought. *Mantell v. International Plastic Harmonica Corp. et al* (1947) N. J. , 55 A. (2d) 250, 173 A.L.R. 1185, supported by note at pages 1198 to 1202.

3. **By Appellees other than Charles P. Brewer:** Appellant wonders what happened to the other appellees besides Brewer. Have they abandoned him? Other than a reference to their immaterial testimony that they received no secret formulae (Appellee's Brief p. 6), there is no mention of them or any defense in their behalf. All other citations of testimony are to Brewer's, all argument in his behalf, all references to his contract and none to that of other employees. There is no answer by defendants Rosalie Brewer, Raymond Rightmire, or Earl Merriott to the claims of appellant.

APPELLEES' FAILURE TO ANSWER APPELLANT'S ERROR NO. 2—CONSPIRACY

1. Twenty out of thirty-eight pages in appellant's brief were given to citations in the record and to legal authorities to prove a conspiracy between these appellees.

There is but one reference to conspiracy in appellees' brief, to-wit: "These findings negative the conspiracy claimed by the appellant" (Appellees' Br. 6).

2. This means that appellees rely solely on the trial court's alleged finding without naming it. There is no finding on conspiracy, as to its existence or non-existence, made by the trial court.

The nearest approach is finding No. 4 (75), saying that Brewer engaged in the pest control business and employed Rightmire and Merriott and admits serving "upwards of one hundred customers of the plaintiff." Nowhere in appellees' record is there any effort to support the trial court in failing to comply with the Federal Rules of Civil Procedure, No. 52 (a) on so obvious and prominent an issue.

Appellant has no quarrel with the principle that findings of fact shall not be set aside unless clearly erroneous, but denies its application here because there is no finding on conspiracy, and if Finding No. 4 (75) is an attempt to negative conspiracy, then clearly the law permits an appellate court to inquire into the evidence the court had in mind to support its finding.

Wisely, the appellate court does not put too much stress upon the findings of a trial court when prepared by the prevailing parties' attorney with as little direction as was herein given by the court's "Memorandum Opinion" (73).

Under Rule 52 (a), when findings are contrary to the weight of the evidence, even though they are sustained by the spoken word from the witness stand, the appellate court has power to reverse any judgment based thereon. While the findings are

presumptively correct, they are not conclusive on appeal as against the clear weight of evidence.

In the case of *State Farm Mutual Automobile Insurance Co. v. Bonacci* (CCA 8th) 111 F. (2d) 412, the court said:

“The rule plainly contemplates a review by the Appellate Court of the sufficiency of the evidence to sustain the Findings.” (p. 415).

The court, in its decision, quoted *Simpkins Federal Practice* (3rd ed.) p. 488, as follows:

“Under the new practice where Findings are made by the Court without a Jury, the Appellate Court is not limited to the mere question whether there is any substantial evidence to support them but may set them aside if against the clear weight of the evidence, at the same time giving full effect to the specific qualification of the Trial Judge to pass on creditability.”

Appellant urges upon this court that there is no finding on the question of conspiracy and no fact or reason given in appellees' brief why such finding should not be made in accordance with the evidence and as contended by appellant (Appellant's Br. 7-27, incl.).

APPELLEES' FAILURE TO ANSWER ERROR NO. 3—EQUITABLE RELIEF

The only phase of this case which apparently alarms Charles P. Brewer is the possibility of injunctive relief in favor of the appellant. It was the relief which the trial court came nearest to grant-

ing (Tr. 73). It would prevent Brewer or any associate still with him, from continuing their commercial piracy. Brewer's contentions on this point present the only semblance of an issue upon this appeal. They may be classed as follows:—

1. Injunction should not issue because no secret processes were disclosed to appellees (Appellees' Br. 6). Owing to the business relations that were disturbed and the contractual relations between employer and customer that were broken, this contention is immaterial, and Finding No. 5 (75), based on such claim, is equally immaterial and goes to no real issue in this case. (See Appellant's Br. pp. 28-29, incl.)

2. **Repudiation of Contract:** The claim by Brewer that Paramount repudiated his franchise, was the only defense that he pled in this case (70). It has been fully refuted in appellant's brief (pp. 19 to 27).

3. In the remaining portion of appellees' brief there are confused and irrelevant claims whose only purpose could be to cloud the issue. One of these claims is that Paramount "breached the contract" (Appellee's Br. p. 7). This is an affirmative defense and should be pled, but there was no pleading that Paramount breached its franchise in appellees' Answer (67 to 71). There is no evidence of a breach submitted as such. There was no finding to that effect (74-77). The question cannot be raised for the first time on appeal.

4. Appellee Brewer claims his franchise was unreasonable and unfair. This claim was not pled in his Answer (67-71). If he is sincere in such a claim, as the asserter of the fact, he has the burden of proving it and there is no proof. The lack of proof was so obvious to the trial court (even holding in Brewer's favor on other issues) that it deleted any proposed finding that the contract was "not fair and reasonable" (76). The appellees took no appeal from this holding of the court. Appellant has shown eight individuals, operating in different territories under these contracts, have earned substantial incomes, and under such conditions a contract could not be considered unfair or unjust.

In effect, Brewer claims though he contracted that he would give ninety days' notice of terminating his agreement and contracted to refrain from canvassing, soliciting or catering to any customers of his employer known to him, and admits he did not give such notice because he was afraid that the company would take prompt steps against his conduct, and he did solicit and serve not less than a hundred and forty-two of appellant's customers, that no injunction should prohibit him from continuing his unlawful conduct, but should leave him free, irrespective of his contract or the appellant's alleged violation thereof, to continue to interfere and cause the breach of contracts to which he was not even a party.

It is well established in law that this appellant has a right to perform a contract which it has made

with its customers and to reap the profits resulting from that contractual relation and performance, and appellant has a right to expect and demand performance by these customers, and such rights are declared property which either the customer or Paramount may ask to be performed, and certainly freed of the unlawful interference by Brewer or his associates. (84 A.L.R. 43)

This principle is clearly recognized in *Snow Cap Dairy v. Robanske* (1935) 151 Or. 59 (47 P. 2d) 977, where the court said:

“We agree with counsel for appellant, that a party will be enjoined from soliciting customers of another party in violation of his contractual obligation to refrain therefrom. In every case cited by appellant in support of this proposition, the contract of employment had a clause to the effect: That when the employment should cease, the employee would thereafter refrain from soliciting the customers of the employer to give their patronage to some one else * * *. Where one sells a professional business and its good will, there would seem to be an implied contract that the vendor would not thereafter enter into competition with the vendee and thus destroy the good will he sold.” (p. 61).

See *Columbia Tent and Awning Company v. Thiele*, 135 Or. 511.

In *Fairbanks Morse & Co. v. Texas Electric Service Co.* (CCA 5th 1933) 63 F. (2d) 702, the court said:

“It must be conceded that, generally speaking, it is tortuous for one, without justification, to

induce another to breach a contract, and that it is quite generally assumed as a matter of course that an injunction will be granted when the breach of valid contracts is, without legal justification, being or about to be induced." (p. 705) (No contractual relation here involved.)

See *Paramount Pictures, Inc. et al v. Leader Press, Inc. et al* (CCA 10th 1929) 106 F. (2d) 229 (no contract involved); *Falstaff Brewing Corp'n v. Iowa Fruit & Produce Co.* (CCA 8th 1940) 112 F. (2d) 101 (employment contract involved).

Even strangers to a contractual relation may be enjoined from aiding the violation thereof by others. *Lyle et al v. Haskins et al* (1946) 24 Wash. (2d) 883, 168 P. (2d) 797.

CONCLUSION

The record must impress the court that appellant has used diligent efforts to keep abreast of the times in the treatment of all pests, that it has developed contractual relations satisfactory to all except Brewer and his associates, and that it had trained Brewer and given him assistance beyond the contractual obligations.

It must also be apparent that Brewer and wife could not resist the temptation to take that business for themselves when at their employer's expense it had been developed to be a profitable and going concern.

The failure of appellees to answer the propositions made is a confession of their legal liability

and their servicing for themselves customers that they knew were under contract with appellant and their preparation to take over that business by procuring printed matter in their own name long before they made any disclosure of their intention to leave appellant's employ, is an indication of the lack of moral as well as legal responsibility, and their admission in securing the business of appellant for themselves clearly renders them liable to injunctive and legal relief.

Respectfully submitted,

KENNETH C. GILLIS

and

ROBERT R. RANKIN,

Attorneys for Appellant

NO. 11893

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

EUGENE LA MOORE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellee's Brief

*On Appeal From the District Court for the
Territory of Alaska, Division Number One.*

P. J. GILMORE, JR.,

United States Attorney,

and

STANLEY D. BASKIN,

Assistant U. S. Attorney,

Attorneys for Appellee.

FILED

FEB 28 1949

PAUL P. O'BRIEN,

CLERK

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IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

EUGENE LA MOORE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

} NO. 11893

APPELLEE'S BRIEF

PRELIMINARY STATEMENT

Appellant, who was the defendant below, brings this appeal from his conviction of the crime of Murder in the First Degree in violation of Section 4757, Compiled Laws of Alaska, 1933, upon the verdict of a jury after a trial in the District Court of Alaska, First Division. The Honorable George W. Folta, presiding, sentenced appellant to the mandatory sentence of death by hanging.

STATEMENT OF FACTS

Appellant, Eugene La Moore, in company with one

Austin Nelson left a down town bar in Juneau, Alaska, at about 12:30 A.M., December 22, 1946, and walked together to a neighborhood combinaton grocery-liquor store in Juneau where they, after finding both the liquor and grocery store sections closed, rapped on the store door to get the owners' attention. Jim Ellen, the store owner, had his living quarters at the rear of the store and this fact as well as the fact that he frequently waited on customers after regular store closing hours was known to LaMoore and Nelson. When, in response to their rap Ellen appeared at the door, he was struck with a blunt instrument on top of the head several times, causing lacerations. He was then taken forcibly or carried to the rear of the liquor store which was part of the grocery store, where his throat was cut nearly from ear to ear, severing every large blood vessel in his neck. His exsanguinated body was found in a slumped position shortly before noon the same day and although Ellen was generally known to have always carried a considerable amount of money on his person none was in his possession when his body was discovered. Likewise his safe, which was located in his living quarters at the rear of the store, had been opened and robbed.

Investigation led to the immediate apprehension and subsequent jury trial and conviction of Austin Nelson of Murder in the First Degree. Shortly before the date set for his execution Nelson confessed to his participation in the robbery and murder, and

implicated the appellant. Shortly thereafter, appellant in an oral statement to a Deputy U. S. Marshal, admitted his participation in the robbery of Ellen and later on the same day he signed a statement after again relating his participation in the plan and actual robbery of Ellen. His written statement was made in the presence of and to a Deputy Marshal and a local attorney whom he had requested to see. The attorney present advised him on his first seeing appellant that he could not represent him and was not there for that purpose and repeated words to the same effect before taking down appellant's statement which was made to the Deputy Marshal and the attorney jointly and while both of them were present. During appellant's trial a Government witness testified that he saw Nelson and LaMoore standing in front of Ellen's Store, in the doorway at approximately between 12:15 and 12:20 A. M., December 22, 1946. His identification of both Nelson and Appellant was positive and he further testified that he spoke to one of them on seeing them as he passed Ellen's Store. Likewise, the 32-caliber automatic pistol admittedly used by Nelson and appellant in connection with the robbery and killing of Ellen was recovered from the home of the appellant's parents-in-law with whom appellant and his wife lived.

It was on the basis of this and other evidence and numerous other corroborative circumstances, that the appellant was found guilty by a jury in the District

Court for the Territory of Alaska at Juneau, of First Degree Murder, in violation of Section 4757, Compiled Laws of Alaska, 1933.

ISSUES

I

NO ERROR WAS COMMITTED BY THE TRIAL COURT IN PERMITTING THE INTRODUCTION OF DEFENDANT'S STATEMENT, GOVERNMENT'S EXHIBIT NO. 4, INTO EVIDENCE AS IT WAS A PURELY VOLUNTARY STATEMENT AND NOT GIVEN UNDER IMPROPER INFLUENCES.

Appellant suggests his confession was given under improper influences, and was not admissible in evidence, it being unreliable and untrustworthy. It is apparent, however, from his argument that the real contention is that the statement was made involuntarily. This argument is based entirely upon the supposition that the statement was in fact involuntarily made. The involuntary character of the statement is nowhere pointed out, and appellant's proposition is not supported by the testimony.

Confessions are presumed to have been voluntarily made.

Murphy v. United States (CCA-7) 285 F. 801,
Cert. Den. 261 U.S. 617.

Evidence was introduced to show that appellant made his confession on the day of July 1, 1947, to Walter Hellan, Deputy United States Marshal, des-

cribing his participation with Austin Nelson in the robbery and murder of deceased, (Tr. 28, 32) and at the same time appellant offered to execute a written statement to be made in the presence of Hellan and H. L. Faulkner, a Juneau attorney. (Tr. 30, 31) At about 8:00 P. M. on the evening of July 1, 1947, Faulkner, after advising appellant that he could not and would not represent him as his attorney, was told by appellant of the details of his, appellant's, participation in the robbery and murder, and shortly afterward dictated his confession to Faulkner and Hellan. At appellant's request Faulkner typed the confession as it was described by defendant, Faulkner reading each paragraph as it was typed. (Tr. 31, 32, 34, 55, 56, 58) When the confession was completely typed Faulkner read it to appellant (Tr. 33, 34) and then appellant read it, and upon finishing reading it appellant said it was all right and signed it. (Tr. 33) Thus, on three different occasions appellant voluntarily confessed to his participation in the crimes of robbery and murder. Both witnesses, Faulkner and Hellan, testified appellant was informed that Faulkner would not represent him as his attorney and further that he did not have to make a statement unless he wanted to, and no force, threats, coercion, or promises were made as an inducement. (Tr. 28, 32, 33, 52-58, 61, 179)

That appellant's confession was given freely and voluntarily may be inferred from his own testimony.

On direct examination in answer to the question, "Why did you make your statement as you did . . . ?" appellant stated, "To help him" . . . Austin Nelson . . . "by prolonging his life" . . . "to help save his life." (Tr. 120, 121, 122). On cross examination appellant admitted that he had a conversation with Walter Hellan on July 1, 1947, and told him, Hellan, that he, appellant, was with Austin Nelson when the robbery and murder of deceased was committed, and that the statement was voluntary with no force being used. (Tr. 125 and 126)

In *Wilson v. United States* (Sup. Crt. U.S.) 162 U.S. 613, 40 L Ed. 1090, it is said "The true test of admissibility is that the confession is made freely and voluntarily and without compulsion and inducement of any sort." The Court held as admissible statements made by the appellant to a United States Commissioner which were contradictory to statements made by him at his trial.

Confinement, imprisonment and being in irons in itself was not sufficient to justify the exclusion of a confession, where it appeared to have been voluntary, and not obtained by putting the prisoner in fear and by promises.

Sparf and Hansen v. United States (Sup. Crt. U.S.) 156 U.S. 51, 55.

A confession made while the defendant was in custody under armed guards, wearing handcuffs was ad-

mitted in evidence as being voluntary where no promises or threats were made.

Greenhill v. United States (CCA-5) 6 F 2d 134

These authorities along with the following support the ruling of the trial court in admitting appellant's confession:

Lewis v. United States (CCA-9) 74 F 2d 173

Young, et al v. Terr. of Hawaii (CCA-9 163 F 2d 490

Murphy v. United States (CCA-7 285 F 801,
Cert. Den. 261 U.S. 617

Marcus et al v. United States, 86 F 2d 854

Regarding appellant's mental strain, H. L. Faulkner testified appellant was not under any great mental stress or strain of any kind (Tr. 57) and his only physical restraint consisted of leg irons. (Tr. 45, 57) If defendant's own testimony merits belief, in view of the many contradictory statements he made concerning his confession while testifying in his own behalf, it must be resolved that he was not suffering from any mental condition which rendered the confession unworthy of consideration by the jury. On direct examination he described his mental condition as "all up in the air," and when again asked what mental condition he was in, replied, "I don't know." (Tr. 110, 111) It is not argued that he was mentally ill or that he was mentally exhausted from extended or harassing questioning by officers or other persons.

Skiskowski v. United States, 158 F 2d 177

Obviously the only mental strain and stress in which he was laboring was that of a man conscious of his own guilt in the robbery and murder of another. No authority has been found holding confessions made while under such mental stress and otherwise voluntary, inadmissible as evidence, and it is submitted that none can be found.

II

PLAINTIFF'S STATEMENT GOVERNMENT'S EXHIBIT NO. 4 WAS NOT GIVEN TO ATTORNEY IN THE COURSE OF PROFESSIONAL EMPLOYMENT AND DID NOT THEREFORE CONSTITUTE A CONFIDENTIAL DOCUMENT—ALSO THE STATEMENT WAS MADE TO AND IN THE PRESENCE OF A THIRD PERSON.

Appellant contends that his confession given to H. L. Faulkner and Walter Hellan is a privileged communication made to his attorney. Presumably the argument is based upon the Alaska Statute Section 4310, Compiled Laws of Alaska, 1933, which provides "An attorney shall not, without the consent of his client, be examined as to any communication made by his client to him, or his advice given thereon, in the course of his professional employment." This provision is identical with the Oregon Code, Vol. 1, Sec. 3-104-2, Oregon Compiled Laws Annotated 1940 and is said to be a declaration of the Common Law rule.

State ex rel. Hardy v. Gleason (Sup. Ct. Ore.)
April 23, 1890, 23P, 817, 818

*People ex rel. Vogelstein v. Warden of County
Jail of New York County*, (Sup. Ct. N.Y.
Co.) 270 NYS 362

Wigmore on Evidence, 3rd Ed. Sec. 2292

The statute therefore must be construed in the light of the decisions on the subject. In order that communications to attorneys be classed as privileged and made inadmissible as evidence it is necessary that the professional relation of attorney and client exist at the time the communication is made; that the communication be made on account of that relation; and the communication is relevant to the subject-matter of the attorney's engagement, to enable the attorney to use his ability, skill, and learning in the discharge of his office of attorney in relation thereto.

York v. United States (CCA-8) 224 F 88

When tested by this principle it is submitted that the facts of instant case do not reveal a relationship of attorney and client existing between appellant and H. L. Faulkner, the Government witness, at any time; before, after, or during the time appellant made his confession.

H. L. Faulkner testified that he was never an attorney for appellant and when he first talked with him, July 1, 1947, advised appellant that he could not and would not represent him, and that he wanted appellant to clearly understand that he, Faulkner, was not his attorney. (Tr. 53) Again in the presence

of appellant and Walter Hellan, Faulkner told appellant he could not represent him as an attorney. (Tr. 56, 58, 61, 179) This testimony is verified by Walter Hellan. (Tr. 32, 182)

Authorities supporting the ruling of the trial court in holding that attorney and client relationship did not exist in instant case, and the general principle that where no attorney-client relationship exists, communications to an attorney, where relevant, are not privileged and are admissible as evidence, are as follows:

York v. United States, Supra

Steiner v. United States (CCA-5) 134 F 2d 931, 934-935

Bolling v. United States (CCA-5) 76 F 2d 390

Smale v. United States (CCA-7) 3 F 2d 101, Cert. Den. 276 U.S. 602

State v. Rush (Sup. Ct. W. Va.) 150 SE 740, 741

It has also been held that privilege does not extend to communications voluntarily made to a lawyer after he has informed the person making them that he will not accept employment in the matter to which the communication relates. 5 ALR Pg. 729

In *People v. Hess*, Supreme Court, New York, 40 NYS 486, 5 ALR Pg. 729, defendant was accused of shooting deceased. The examining magistrate who inquired into the homicide was attorney for defendant in other matters, and on being requested to represent defendant in the homicide prosecution, declin-

ed. Later, while visiting defendant in jail, defendant told the attorney as a friend, the details of the shooting. The Court held that under a statute providing for non-disclosure by attorney of communications of clients to them "given in the course of professional employment" the relation of attorney and client did not exist and defendant having been distinctly informed of the fact, the communication was admissible.

Even if the Court should have considered Mr. Faulkner as the appellant's attorney at the time the confession was made, another element prevails which takes the communication out of the privileged category. Appellant first told Walter Hellan of his participation in the robbery and murder of deceased. Then later he told Mr. Faulkner substantially the same story and later dictated the confession to Hellan and Faulkner while both were present and while the latter typed it. Hellan was in no way associated with the law office or practice of H. L. Faulkner. He was in fact a Deputy United States Marshal, well known to appellant, and at best could have been considered nothing less than an opposite and hostile party. "In order that the rules as to privileged communications between attorney and client or its reason shall apply, it is necessary that the communication by the client to the attorney or his clerk be confidential and be intended as confidential." 58 Am. Jur. Pg 274 Sec. 490. Appellant, in disclosing the facts first to Hellan and later to Hellan and Faulk-

ner, certainly indicated he did not regard the confession confidential. Therefore, the reason for the privilege ceases to exist, and the rule which protects privileged communications between attorneys and clients does not apply.

York v. United States, Supra

Livezey v. United States, (CCA-5) 279 F 496

State v. Mickel, (Sup. Ct. Iowa) 202 NW 549

Crawford, et al v. Raible, (Sup. Ct. Iowa)
221 NW 474

28 RCL Pg. 561 Sec. 151

58 Am. Jur. Pg. 275 Sec. 492

Wigmore on Evidence, 3rd Ed. Sec. 2311

CONCLUSION

No reversible error was committed by the Trial Court in this case. It clearly appears from the transcript of the record that the Signed Statement of the Defendant, Government's Exhibit No. 4, was a purely voluntary statement made by appellant after being advised that he did not have to make a statement unless he wished to, and that it was made without any inducement, threats, coercion, physical or mental force, and without any offers or promises of reward. Further, that the defendant read the statement and that it was read to him before he signed it. The record also shows that the attorney to whom appellant made his statement told appellant several times in no uncertain language that he couldn't represent him and was not representing him as his attorney, prior to the taking of the statement which was

not in any event a statement of a confidential nature, as it was related at the same time to a third person and in the presence of said third person, and had been previously made by appellant to a Deputy U. S. Marshal.

The Judgment of the Trial Court should, therefore, be affirmed.

Respectfully submitted,

P. J. GILMORE, JR.,

United States Attorney

STANLEY D. BASKIN,

Assistant U. S. Attorney.

No. 11894

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PRINTING SPECIALTIES AND PAPER CON-
VERTERS UNION, LOCAL 388, A. F. L., and
WALTER J. TURNER,

Appellants,

vs.

HOWARD F. LeBARON, Regional Director of the
21st Region of the National Labor Relations Board,
on Behalf of the NATIONAL LABOR RELA-
TIONS BOARD,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal From the District Court of the United States
for the Southern District of California

Central Division

FILED

JUN 18 1946

PAUL P. O'BRIEN,



No. 11894

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PRINTING SPECIALTIES AND PAPER CONVERTERS UNION, LOCAL 388, A. F. L., and
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TRANSCRIPT OF RECORD

Upon Appeal From the District Court of the United States
for the Southern District of California
Central Division



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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellants:

ROBERT W. GILBERT

CLARENCE E. TODD

ALLAN L. SAPIRO

117 West Ninth Street
Los Angeles 15, Calif.

For Appellee:

ROBERT N. DENHAM

General Counsel

DAVID P. FINDLING

Associate General Counsel

WINTHROP A. JOHNS

DOMINICK MANOLI

GEORGE H. O'BRIEN

111 West Seventh Street, Room 704
Los Angeles 14, Calif. [1*]

In the District Court of the United States for the
Southern District of California

Central Division

No. 7859-M

HOWARD F. LeBARON, Regional Director of the
21st Region of the NATIONAL LABOR RELA-
TIONS BOARD, on Behalf of the NATIONAL
LABOR RELATIONS BOARD,

Petitioner,

v.

PRINTING SPECIALTIES AND PAPER CON-
VERTERS UNION, LOCAL 388, AFL, and
WALTER J. TURNER,

Respondents.

PETITION FOR AN INJUNCTION UNDER SEC-
TION 10(1) OF THE NATIONAL LABOR RE-
LATIONS ACT, AS AMENDED [2]

To the Honorable District Judge of the United States
District Court for the Southern District of Cali-
fornia, Central Division:

Comes now Howard F. LeBaron, Regional Director of
the 21st Region of the National Labor Relations Board
(hereinafter called the board), and petitions this Court on
behalf of the Board, pursuant to Section 10(1) of the
National Labor Relations Act, as amended June 23, 1947,
(Public Law 101, 80th Congress, Chapter 120, 1st Ses-
sion, hereinafter called the Act), for a temporary restrain-
ing order and for appropriate injunctive relief pending
the final adjudication of the Board with respect to the
matter pending before the Board on charges alleging that

respondents have engaged in and are engaging in violation of Section 8(b), subsection 4(A) of the Act. In support thereof, Petitioner respectfully shows as follows:

1. Petitioner is Regional Director of the 21st Region of the Board, an agency of the United States Government, and files this petition on behalf of the Board.

2. Respondent Printing Specialties and Paper Converters Union, Local 388, AFL (hereinafter called Local 388) is a labor organization within the meaning of Section 2(5) of the Act, and has its principal office at 1543 West 11th Street, Los Angeles, California, within this judicial district.

3. Respondent Walter J. Turner is and has been at all times herein material, an agent of Local 388 and is engaged in this judicial district in promoting or protecting the interests of employee members of respondent Printing Specialties and Paper Converters Union, Local 388, AFL.

4. The jurisdiction of this proceeding is conferred upon this Court by Section 10(1) of the Act.

5. On or about November 18, 1947, Sealright Pacific Ltd. (hereinafter called Sealright), pursuant to the provisions of Section 10(b) of the Act, filed a charge alleging that respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8(b), subsection 4(A) of the Act and affecting commerce within the meaning of Section 2(6) and (7) of the Act. A copy of said charge is attached hereto marked "Exhibit 1" and made [3] a part hereof.

6. Said charge was thereafter duly referred to Petitioner as Regional Director of the 21st Region of the Board for investigation. Petitioner has investigated the said charge.

7. After such investigation, Petitioner has reason to believe and believes such charge is true and that a Complaint of the Board based thereon should issue against respondents. More specifically, from the investigations, Petitioner has reason to believe and believes that respondents and each of them have engaged in and are engaging in conduct in violation of Section 8(b), subsection 4(A) of the Act, within the meaning of Section 2(6) and (7) of the Act as follows:

- (a) Sealright Pacific Ltd. is a corporation organized under and existing by virtue of the laws of the State of California. Its principal office and place of business is located at 1577 Rio Vista Avenue, Los Angeles, California, where it is engaged in the manufacture, sale and distribution of paper food containers and milk bottle caps. In the course and conduct of its business, it purchases and causes to be transported to its Los Angeles plant from points outside the State of California, paper, steel, shipping cases, etc., all valued at an excess of \$1,000,000.00 annually. Its finished products comprising milk bottle caps, milk bottle closures and food containers, are valued at an excess of \$1,000,000.00 annually and more than 50 per cent of such products are shipped outside the State of California.
- (b) Los Angeles Seattle Motor Express, Inc. (hereinafter called L. A. Seattle), 1147 Staunton Avenue, Los Angeles, is a common carrier operating motor trucks between Los Angeles and points in the Pacific Northwest. It has carried Sealright's products for a number of years.

- (c) On November 13, 1947, respondent Walter J. Turner, vice president of Local 388, advised L. A. Seattle that if it continued to handle Sealright's products, L. A. Seattle would be picketed by [4] Local 388.
- (d) On about November 14, 1947, representatives of Local 388 followed two trucks loaded with Sealright's products to the L. A. Seattle terminal where by forming a picket line around the two trucks containing the products of Sealright and telling the employees that the trucks contained "hot cargo" and not to "handle it," induced and encouraged the employees of L. A. Seattle, by orders, force, threats, or promises of benefits, not to transport or handle the goods of Sealright. After November 14, 1947, as a result of the above conduct of Local 388 the employees of L. A. Seattle refused to transport or handle the goods of Sealright. Local 388 engaged in the foregoing conduct to force or require L. A. Seattle to cease handling or transporting the products of Sealright.
- (e) West Coast Terminals Co. (hereinafter called West Coast) is a public wharfinger with its docks and wharves located on Pier A, Berths 2 and 3, Terminal Island, Long Beach (2), California. On or prior to November 17, 1947, West Coast received from Panama Pacific Lines Vessel S. S. Green Bay Victory, a consignment of rolls of paper destined for Sealright's Los Angeles plant.
- (f) On November 17, 1947, while employees of West Coast were engaged in loading the rolls of paper onto freight cars consigned to Sealright in Los

Los Angeles, a group of pickets representing Local 388 appeared at the docks of West Coast and, by forming a picket line around the freight cars being loaded with the rolls of paper for Sealright, induced and encouraged the employees of West Coast, by orders, force, threats, or promises of benefits, not to handle or work on the paper consigned to Sealright. Since November 17, 1947, as a result of the above conduct of Local 388 and the continued picketing by Local 388 of the docks of West Coast, the employees of West Coast have refused to handle or work on the goods consigned to Sealright. Local 388 [5] engaged in the foregoing conduct in order to force or require West Coast to cease handling or transporting the products of Sealright.

8. Unless restrained, the acts above described are in imminent likelihood of being repeated. Thereby irreparable damage will be done to the policies of the Act. To avoid such results, it is just and proper, and appropriate and necessary, that, pending the final adjudication by the Board of the matters involved in said charge, respondents be enjoined and restrained from the commission of said acts, similar acts or repetitions thereof.

Wherefore, Petitioner prays:

1. That the Court issue a rule directing respondents Printing Specialties and Paper Converters Union, Local 388, AFL, and Walter J. Turner, and each of them, to appear to show cause before this Court, at a time fixed by this Court, why an injunction should not issue enjoin-

ing or restraining respondents and each of them and their agents, servants, employees, attorneys, and all persons in active concert or participation with them, pending final adjudication of the Board of such matters, from:

- (a) Engaging in or inducing or encouraging the employees of West Coast Terminal Co. and Los Angeles Seattle Motor Express, Inc. by orders, force, threats, or promises of benefits, or by permitting any such to remain in effect, or by any other like acts or conduct, to engage in a concerted refusal in the course of their employment to transport, or otherwise handle any goods, articles, materials, or commodities or perform any services in order to force or require West Coast Terminals Co. and Los Angeles Seattle Motor Express, Inc. to cease handling, transporting the materials or products of Sealright Pacific Ltd., or to cease doing business with Sealright Pacific Ltd.
 - (b) Engaging in, or inducing or encouraging the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to transport or otherwise handle any goods, articles, materials, or commodities or to perform any [6] services, in order to force or require any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of Sealright Pacific, Ltd., or to cease doing business with Sealright Pacific, Ltd.
2. That upon return of the rule the Court issue an order enjoining and restraining respondents and each of them in the manner set forth above.

8 *Printing Specialties and Paper Converters, etc.*

3. That the Court grant such other and further relief as may be just and proper.

HOWARD F. LeBARON

Regional Director National Labor Relations Board
Twenty-First Region

GEORGE H. O'BRIEN

Attorney National Labor Relations Board

[Verified.]

[Endorsed]: Filed Dec. 17, 1947. Edmund L. Smith,
Clerk. [7]

[Title of District Court and Cause]

MOTION

To the Honorable District Judge of the United States
District Court for the Southern District of California,
Central Division [8]

Comes now George H. O'Brien, attorney, National Labor Relations Board, and respectfully moves that this Court enter an order requiring respondents to appear before this Court on a date and time certain and show cause if any there be why said respondents should not be enjoined and restrained as prayed in the petition heretofore filed herein.

GEORGE H. O'BRIEN

Attorney National Labor Relations Board Twenty-First
Region
111 West Seventh Street
Los Angeles 14, California

[Endorsed]: Filed Dec. 13, 1947. Edmund L. Smith,
Clerk. [9]

[Title of District Court and Cause]

ORDER TO SHOW CAUSE

Upon petition of Howard F. LeBaron, Regional Director of the Twenty-First Region of the National Labor Relations Board, for an [10] injunction enjoining and restraining Printing Specialties and Paper Converters Union, Local 388, AFL, and Walter J. Turner, respondents herein, from engaging in certain acts in violation of the National Labor Relations Act, as amended, pending the final adjudication of said Board with respect to such matters, and good cause appearing therefor,

It Is Ordered that Printing Specialties and Paper Converters Union, Local 388, AFL, and Walter J. Turner, the respondents herein, appear before this Court at Los Angeles, California, on the 30th day of December, 1947, at ten o'clock A. M., or as soon thereafter as counsel can be heard, and then and there show cause, if any there be, why, pending the final adjudication of the Board with respect to such matters, they and each of them, and their agents, servants, employees, attorneys, and all persons in active concert or participation with them, should not be enjoined and restrained as prayed in said petition.

It Is Further Ordered, that respondents Printing Specialties and Paper Converters Union, Local 388, AFL, and Walter J. Turner, and each of them, shall file any answers to the allegations of said petition and the affidavits attached thereto in the office of the Clerk of this Court, and serve a copy thereof upon petitioner

at, on or before o'clock
A. M. on the day of, 1947. [PJM]

It Is Further Ordered that service of a copy of this rule together with a copy of said petition upon which it is issued be made by U. S. Marshal upon respondents Printing Specialties and Paper Converters Union, Local 388, AFL, and Walter J. Turner in any manner provided in the Rules of Civil Procedure for District Courts of the United States, or by registered mail; that similar service be made upon Sealright Pacific [11] Ltd., the charging party; and that proof of such service be filed herein by the U. S. Marshal.

PAUL J. McCORMICK
United States District Judge

Signed at Los Angeles, California, at 1:50 P. M. this
18th day of Dec., 1947.

[Endorsed]: Filed Dec. 13, 1947. Edmund L. Smith,
Clerk. [12]

[Title of District Court and Cause]

NOTICE OF MOTION TO DISMISS PETITION
FOR AN INJUNCTION UNDER SECTION
10(1) OF THE NATIONAL LABOR RELA-
TIONS ACT AS AMENDED

To Winthrop A. Johns and George H. O'Brien, Attorneys
for Petitioner, National Labor Relations Board,
Twenty-First Region, 111 West Seventh Street, Los
Angeles 14, California, Please Take Notice That:

On the 30th day of December, 1947, at 10:00 A. M.,
or as soon thereafter as counsel can be heard, respondents

will appear before this Court at the United States Post Office and Court House Building in the City of Los Angeles, State of California, and will bring the following motion on for hearing:

1. To dismiss this proceeding on the ground that the Court lacks jurisdiction over the same, in that the petition herein has been filed under [13] color of authority of Section 10(1) of the National Labor Relations Act as amended June 23, 1947, (Public Law 101, 80th Cong., Ch. 120, 1st Sess.), and more particularly said petition has been filed pursuant to that provision of Section 10(1) which purports to confer jurisdiction upon this Court to grant injunctive relief against activities proscribed by paragraph (4) (A) of Section 8(b) of said amended Act, which Sections 8(b) (4) (A) and 10(1) are contrary to the Constitution of the United States, Amendments I, V, and XIII, and are therefore wholly invalid and without any legal force and effect.

2. To dismiss this proceeding on the ground that the Court lacks jurisdiction over the person of the respondents and the subject matter of this proceeding in that the sole allegation relating to said jurisdiction set forth in the petition herein invokes the purported authority of Section 10(1) of the National Labor Relations Act as amended June 23, 1947, (Public Law 101, 80th Cong., Ch. 120, 1st Sess.), which portion of said enactment is unconstitutional and void in that it contravenes the Constitution of the United States, Amendments I, V, and XIII.

3. To dismiss this proceeding for lack of jurisdiction on the ground that the petition herein prays for injunctive relief against lawful acts of respondents, which relief in substance and in form would be contrary to the Constitution of the United States, Amendments I, V, and

XIII, and that no other claim upon which relief can be granted has been stated.

ROBERT W. GILBERT
CLARENCE E. TODD
ALLAN L. SAPIRO

By Robert W. Gilbert

Attorneys for Respondents Specially Appear-
ing for Purpose of this Motion

Dated: December 24, 1947

Good cause being shown, the time of notice is hereby shortened to two days.

PAUL J. McCORMICK
Judge, United States District Court

Signed at Los Angeles, California, at 11:30 A. M. this
24th day of December, 1947. [14]

RESPONDENTS' MEMORANDUM OF POINTS AND AUTHORITIES

I.

Members of Labor Organizations as Well as Other Per-
sons Are Constitutionally Guaranteed the Right to
Express Themselves on Matters of Public Concern
Without Being Subject to Prior Restraint

Near v. Minnesota, 283 U. S. 697, 51 S. Ct. 625, 75 L.
Ed. 1357

Grosjean v. American Press Co., 297 U. S. 233, 56 S.
Ct. 444, 80 L. Ed. 660

Thornhill v. Alabama, 310 U. S. 88, 60 S. Ct. 736, 84
L. Ed. 1093

Carlson v. California, 310 U. S. 106, 60 S. Ct. 746, 84 L. Ed. 1104

In re Blaney (decided October 3, 1947) 30 A. C. 648, 654, 184 P (2d) 892

II.

Denial of the Right of Workingmen to Jointly Publicize a Labor Dispute With the Purpose of Persuading Other Employees to Cease Dealing With the Employer in the Dispute Abridges the Cognate Rights of Free Speech and Assembly Embodied in the First Amendment and Amounts to a Denial of Liberty Without Due Process of Law in Contravention of the Fifth Amendment

The rights secured by the First Amendment are cognate rights, or facets of one right, and all are upheld by the "Free Speech" decisions of the Supreme Court of the United States.

Milk Wagon Drivers v. Meadowmoor Dairies, 312 U. S. 287, 293, 61 S. Ct. 552, 85 L. Ed. 497, 132 A. L. R. 1200

Murdock v. Pennsylvania, 319 U. S. 105, 111, 63 S. Ct. 870, 87 L. Ed. 1292, 146 A. L. R. 81

Thomas v. Collins, 323 U. S. 516, 530, 531, 65 S. Ct. 315, 89 L. Ed. 436 [15]

De Jonge v. Oregon, 299 U. S. 353, 57 S. Ct. 255, 81 L. Ed. 278

The right of all persons to gather together and peaceably address their attention to matters of common concern as a means of furthering their political, social, economic or religious objectives is basis to our form of representative democracy, irrespective of statutory law.

14 *Printing Specialties and Paper Converters, etc.*

United States v. Cruikshank, 92 U. S. 542, 552, 23 L. Ed. 588

Herndon v. Lowry, 301 U. S. 242, 259, 57 S. Ct. 732, 81 L. Ed. 1066

De Jonge v. Oregon, *supra*,

“The First Amendment is a charter for government, not for an institution of learning. ‘Free trade in ideas’ means free trade in the opportunity to persuade to action, not merely to describe facts . . . and the right either of workmen or of unions under these conditions to assemble and discuss their own affairs is as fully protected by the Constitution as the right of businessmen, farmers, educators, political party members, or others to assemble and discuss their affairs and to enlist the support of others.”

Thomas v. Collins, *supra*, 323 U. S. at 537, emphasis supplied.

See also *In re Porterfield*, 28 Cal. (2d) 91, 168 P. (2d) 706, 167 A. L. R. 675

III.

Peaceful Picketing and Threat of Peaceful Picketing
Which Constitute the Only Charges Made Against
Respondents Come Within the Constitutional Safe-
guards of the First Amendment

Cafeteria Employees' Union v. Angelos, 320 U. S. 293, 64 S. Ct. 126, 88 L. Ed. 58

Hotel Employees' Local v. Board, 315 U. S. 437, 62 S. Ct. 706, 86 L. Ed. 946

Bakery Wagon Drivers' Local v. Wohl, 315 U. S. 769, 62 S. Ct. 816, 86 L. Ed. 1178

Carpenters' Union v. Ritter's Cafe, 315 U. S. 722, 62 S. Ct. 807, 86 L. Ed. 1143

A. F. of L. v. Swing, 312 U. S. 321, 61 S. Ct. 568, 85 L. Ed. 855 [16]

Carlson v. California, 310 U. S. 106, 60 S. Ct. 746, 84 L. Ed. 1104

Thornhill v. Alabama, 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093

Senn v. Tile Layers' Protective Union, 301 U. S. 468, 57 S. Ct. 857, 81 L. Ed. 1229

In re Blaney, *supra*, 30 A. C. at 652

In re Porterfield, *supra*, 28 Cal. (2d) at 114

Park and Tilford Import Corp. v. Int'l. Brotherhood of Teamsters, 27 Cal. (2d) 599, 608, 165 P. (2d) 891, 162 A. L. R. 1426

In re Bell, 19 Cal. (2d) 488, 497, 122 P. (2d) 22

McKay v. Retail Automobile Salesmen's Local Union, 16 Cal. (2d) 311, 319, 333, 106 P. (2d) 373

Fortenbury v. Superior Court, 16 Cal. (2d) 405, 106 P. (2d) 411

In re Lyons, 27 Cal. App. (2d) 293, 81 P. (2d) 190

Hughes v. Superior Court, (decided November 20, 1947,) 82 A. C. A. 491, 508

This "modern trend of decision" makes it plain that publicizing the facts of a labor dispute, whether verbally, by the publication of printed matter, or by peaceful picketing, comes within the sphere of protection from prior restraint which is guarded with a jealous eye by the highest tribunals of state and nation.

Emde v. San Joaquin County Labor Council, 23 Cal. (2d) 146, 154, 161, 143 P. (2d) 20, 150 A. L. R. 916

IV.

Fairly Construed and With Conclusions of Law Eliminated, the Petition Herein Merely Charges Respondents With Picketing and Threatening to Picket the Products of the Employer With Whom a Labor Dispute Is Pending. Picketing of Such "Unfair" Products Is Well Recognized as Coming Within the Protection of the First Amendment

Carpenters' Union v. Ritter's Cafe, *supra*, 315 U. S. at 727

Bakery Wagon Drivers' Local v. Wohl, *supra*

In re Blaney, *supra*, 30 A. C. at 655, 184 P. (2d) at 897, col. 2

Park and Tilford Import Corp. v. Int'l. Brotherhood of Teamsters, *supra* [17]

Fortenbury v. Superior Court, *supra*

See also Emde v. San Joaquin County Labor Council, *supra*

V.

This Statute Comes Before the Court Aided by No Presumption of Constitutionality, Since the Usual Presumption Must Yield to the High Favor Accorded to the Rights Secured by the First Amendment

Thomas v. Collins, *supra*, 323 U. S. at 529, 530

Hague v. C. I. O., 307 U. S. 496, 59 S. Ct. 954, 83 L. Ed. 1423

Cantwell v. Connecticut, 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213, 128 A. L. R. 1352

Schneider v. New Jersey, 308 U. S. 147, 60 S. Ct. 315, 89 L. Ed. 430

Lovell v. Griffin, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949

VI.

These Personal Rights, of Worship, Assembly, Petition,
Free Speech and Free Press Enjoy Precedence and
High Favor Not Accorded to Property Rights and
Are Susceptible of Restriction Only to Prevent Grave
and Impending Public Danger

Tucker v. Texas, 326 U. S. 517, 66 S. Ct. 274, 90 L.
Ed. 274

Marsh v. Alabama, 326 U. S. 501, 66 S. Ct. 276, 90
L. Ed. 265

Thomas v. Collins, *supra*, 323 U. S. at 529, 530

West Virginia Board of Education v. Barnette, 319
U. S. 624, 638-39, 63 S. Ct. 1178, 1186 Col. 1

Murdock v. Pennsylvania, *supra*

In re Porterfield, *supra*

See Also People v. Oyama, 29 Cal. (2d) 164, 176

Whatever the legislative judgment, the Court must de-
termine independently in the light of our constitutional
tradition whether a clear and present danger of the gravest
abuses endangering society as a whole exists to justify
the intrusion upon the domains of free speech and
assembly under Sections 10(1) and 8(b) (4) (A) of
the National Labor Relations Act as amended June 23,
1947. [18]

VII.

Section 8(b) (4) (A) of the Amended National Labor
Relations Act, Incorporated by Reference in Section
10(1) of Said Act, Is Void on Its Face as an
Abridgment of Free Speech and Assembly

The existence of such a statutory provision "which
does not aim specifically at evils within the allowable area
of (government) control, but on the contrary sweeps
within its ambit other activities that in ordinary circum-

stances constitute an exercise of freedom of speech . . .” inevitably “results in a continuous and prevasive restraint on all freedom of discussion that might reasonable be regarded as coming within its purview.”

Where such regulation of the dissemination of information is involved, there are special reasons for testing the challenged section of the statute on its face. If certain of its provisions operate to prohibit peaceful picketing, they are invalid even though they might also prohibit acts that may properly be made unlawful.

Jones v. Opelika, 316 U. S. 584, 319 U. S. 103, 63 S. Ct. 890, 87 L. Ed. 1290

Thornhill v. Alabama, *supra*, 310 U. S. at 97

Carlson v. California, *supra*

Schneider v. New Jersey, *supra*, 308 U. S. at 162-165

Hague v. C. I. O., *supra*, 307 U. S. at 518

Lovell v. Griffin, *supra*, 303 U. S. at 451

Stromberg v. California, 283 U. S. 359, 369, 51 S. Ct. 532, 75 L. Ed. 1117

In re Blaney, *supra*, 30 A. C. at 656-658

In re Porterfield, *supra*

In re Bell, *supra*, 19 Cal. (2d) at 495

VIII.

The Terms of Section 8(b) (4) (A), Which Are Incorporated in the Proposed Injunction Sought Herein Almost Verbatim, Are Violative of Due Process of Law Because They Are Vague, Indefinite and Uncertain

A statute which declares unlawful the doing of an act in terms so vague [19] than men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of

law. Language prohibiting conduct that may be prohibited and conduct that may not afford no reasonably ascertainable standard and is therefore too uncertain and vague to be enforced.

Lanzetta v. New Jersey, 306 U. S. 451, 59 S. Ct. 618, 81 L. Ed. 888

In re Blaney, *supra*, 30 A. C. at 656

In re Bell, *supra*, 19 Cal. (2d) at 495

IX.

The Separability Clause of the Amended National Labor Relations Act Set Forth in Section 16 Cannot Save Section 8(b) (4) (A) as Incorporated in Section 10(1) From Being Declared Totally Invalid

Smith v. Cahoon, 283 U. S. 553, 563

In re Bell, *supra*, 19 Cal. (2d) at 498

In re Porterfield, *supra*, 28 Cal. (2d) at 120

In re Blaney, *supra*, 30 A. C. at 658-660

Where there is no possibility of mechanical severance, as where the language is so broad as to cover subjects within and without the legislative power, the general language of the statutory provision infringing upon the constitutional right of free speech leaves the count with no alternative but to nullify the entire section.

X.

The Application of Section 10(1) in the Manner Prayed for by Petitioner Herein Would Violate the Inhibition of the Thirteenth Amendment Against Involuntary Servitude

See Podlock v. Williams, 322 U. S. 4, 64 S. Ct. 792, 88 L. Ed. 1095

[Endorsed]: Filed Dec. 24, 1947. Edmund L. Smith, Clerk. [20]

[Title of District Court and Cause]

AFFIDAVIT OF WALTER J. TURNER IN
SUPPORT OF MOTION TO DISMISS

State of California

County of Los Angeles—ss.

Walter J. Turner, being duly sworn, deposes and says that:

Affiant is now, and was on December 17, 1947, and has been for some time previous to December 17, 1947, Secretary-Treasurer of the Printing Specialties and Paper Converters Union, Local 388, AFL, with offices at 1543 West 11th Street, Los Angeles, California;

Affiant is the same Walter J. Turner who is named as a respondent in the above-entitled proceeding;

Printing Specialties and Paper Converters Union, Local 388, hereinafter [21] referred to as Local 388, is a subordinate union of the International Printing Pressmen and Assistants' Union of North America, affiliated with the American Federation of Labor, and includes within its membership approximately 1,800 employees of the paper conversion and allied industries in the City of Los Angeles and nearby communities;

Local 388 is a party to numerous collective bargaining agreements with the various employers of its members engaged in the manufacture, distribution and sale of envelopes, paper boxes of both the folding and set-up varieties, waxed paper, manifold sales books, bank checks, tags, labels, corrugated boxes, and other similar paper products, in addition to paper food containers and milk bottle caps.

Local 388 has consummated agreements with various employers engaged in the manufacture, distribution and

sale of said paper products during the past twelve months by the terms of which approximately 1,500 members of the union are assured of a prevailing scale of minimum wages ranging from \$1.20 to \$1.33½ per hour for the lowest skilled male job classification, and from \$1.10 to \$1.22 per hour for the lowest skilled female job classification, with progressively higher rates for the several skilled job classifications set forth in said agreements.

All of the aforementioned collective bargaining agreements negotiated by Local 388 within the immediate past twelve months provide the approximately 1,500 union members coming within the scope of their terms and provisions with at least six (6) designated holidays for which they have received or are entitled to receive full compensation according to their regular wage scales.

Local 388 was recognized as the exclusive bargaining agent of the production employees of the Los Angeles plant of Sealright Pacific, Ltd. during the month of September, 1941 by said corporation, and a collective bargaining agreement was entered into between said union and said employer at or about that date. Each year thereafter from 1941 to the year 1946 successive collective bargaining agreements were negotiated and executed between Local 388 and Sealright Pacific, Ltd. Each collective bargaining agreement from the initial agreement in 1941 to the last agreement entered into in 1946 was arrived at by [22] negotiations between Local 388 and Sealright Pacific, Ltd. without any strike, lock-out, or other similar interruption of production taking place;

The latest collective bargaining agreement executed between Local 388 and Sealright Pacific, Ltd. provided for opening for modification or termination as of Octo-

ber 16, 1947 by either party upon sixty days' notice on or after the 16th day of August, 1947. Pursuant to said provision of the agreement (and in accordance with Section 8 (d) (1) of the National Labor Relations Act as amended June 23, 1947), Local 388 gave notice to Sealright Pacific, Ltd. of proposed modifications thereof on August 16, 1947.

Between August 16, 1947 and September 16, 1947 approximately six (6) meetings were held between representatives of Local 388 and representatives of Sealright Pacific, Ltd. for the purpose of negotiating with respect to said proposed contract modifications, but no agreements were reached during the course of these meetings. On September 15, 1947, in compliance with Section 8 (d) (3) of the National Labor Relations Act as amended on June 23, 1947, Local 388 notified the Federal Mediation and Conciliation Service and the California State Department of Industrial Relations that a dispute existed.

Between September 16, 1947 and October 29, 1947 five additional negotiating meetings were held between representatives of Local 388 and representatives of Sealright Pacific, Ltd., during the course of which meetings mutual consent was arrived at between the two parties as to all terms of a new collective bargaining agreement, except wage rates and holiday pay. At the last of these meetings on October 29, 1947 Sealright Pacific Ltd. offered to raise the hourly rate for the lowest skilled male job classification from \$1.02½ to \$1.10 per hour, (the prevailing male base rate ranging from \$1.20 to \$1.33½ per hour as aforementioned). It also offered to raise the hourly rate for the lowest skilled female job classification from \$0.87½ per hour to \$0.92½ per hour, (the prevailing female base rate ranging from \$1.10 to \$1.22 per hour).

Corresponding wage adjustments in the rates for the more highly skilled job classifications were proposed, and in addition Sealright Pacific, Ltd. expressed its willingness to offer a further general wage increase of two and one-half cents (\$0.02½) more per hour to become effective on or about January 16, 1948. Sealright [23] Pacific, Ltd. then expressed its unwillingness to increase the number of designated paid holidays from three (3) to the prevailing six (6) as requested by Local 388.

Basing its request for proposed modifications with respect to wages and holiday pay on the standards contained in the various existing agreements between Local 388 and the several employers of nearly 1,500 members of said local union mentioned hereinabove, Printing Specialties and Paper Converters Union, Local 388 was unwilling to accept the wage offer proposed by Sealright Pacific, Ltd. on or about October 29, 1947, after that employer had rejected the compromise proposal made by Local 388 for a male base rate of \$1.17½ per hour and a female base rate of \$1.02½ per hour, together with a provision for six (6) paid holidays. Being unable to reach agreement with said employer with respect to the sole disputed matters of wage rates and holiday pay, Local 388 called a lawful strike of its members against Sealright Pacific, Ltd. on or about Monday, November 3, 1947.

At the time said strike was instituted on or about November 3, 1947, all of the approximately 70 production employees of the Los Angeles plant of Sealright Pacific, Ltd. were members in good standing of Local 388. All but three of said employees joined said strike against their employer, Sealright Pacific, Ltd. Peaceful picket lines were established by Local 388 in front of or near the

entrances to the struck plant upon the occasion of the commencement of the strike, and have continued from that date to this.

At some time between November 3, 1947 and November 17, 1947, affiant met and conferred with a Mr. Lacey, whom affiant is informed and believes is manager of the Los Angeles-Seattle Motor Express, Inc. Affiant at that time informed Los Angeles-Seattle Motor Express, Inc. that Local 388 was engaged in a strike due to a wage dispute with Sealright Pacific, Inc. Affiant also informed Los Angeles-Seattle Motor Express, Inc. that Local 388 intended to peacefully picket the Sealright products manufactured under strike conditions and at substandard wages for the purpose of publicizing the dispute and soliciting the assistance of other workers asking that they decline to handle this merchandise. At no time did affiant advise Los Angeles-Seattle Motor Express, [24] Inc. that Local 388 would picket all or any of that firm's operations as such, if it continued to handle Sealright products, nor did affiant in any way indicate or imply that Local 388 would picket any other products being handled or transported by said firm for companies other than Sealright Pacific, Ltd., under any circumstances whatsoever.

On or about November 14, 1947, members of Local 388 on strike at Sealright Pacific, Ltd., formed a peaceful picket line around two truck-loads of Sealright products at the Los Angeles-Seattle Motor Express, Inc. terminal. Said striking members of Local 388 then and there advised the employees of Los Angeles-Seattle Motor Express,

Inc., that the Sealright products were manufactured under strike conditions and for substandard wages and requested them not to handle said products. At no time did any officer, agent, representative, or member of Local 388 order, force, threaten any reprisal against or promise any specific benefit to any employee of the Los Angeles-Seattle Motor Express, Inc., for the purpose of bringing about the refusal of said employee to transport or handle the aforementioned or any other Sealright products, or for any other purpose.

On or about November 17, 1947 and for several days thereafter, Local 388 peacefully picketed Sealright products being loaded onto three box cars at the West Coast Terminals Company, Terminal Island, Long Beach, California. Said Sealright products consisted of rolls of paper consigned from a New York plant of Sealright Pacific, Ltd. to the Los Angeles plant of said corporation for use in continued manufacturing operations under strike conditions. At no time has Local 388 picketed any or all of the operations of the West Coast Terminals Company as such, nor has Local 388 picketed any other products being handled or transported by said firm for companies other than Sealright Pacific, Ltd. At no time has Local 388 interfered in any manner with the unloading of any ship or ships of the Panama Pacific Lines or of any other steamship company.

Said three box cars were located on a siding alongside of the warehouse of the West Coast Terminals Company, when Local 388 commenced picketing the same, and at no time during the course of such picketing did the picket

lines established by Local 388 pass in front of the doors of the warehouse. Whenever [25] during such picketing, it was necessary for the West Coast Terminals Company to move these three box cars in order to bring other cars on to or remove other cars from the siding, Local 388 temporarily discontinued its picketing activities and did not in any way interfere with the moving of the three box cars in question incidental to these operations. When the three cars had been moved from and returned to their previous position alongside the warehouse, as took place on several occasions, the picketing of said box cars containing Sealright products was resumed.

At no time in connection with the peaceful picketing of said Sealright products alongside the warehouse of the West Coast Terminals Company did any officer, agent, representative or member of Local 388 order, force, threaten any reprisal against or promise any specific benefit to any employee of said firm for the purpose of bringing about the refusal of said employee to transport or handle the aforementioned or any other Sealright products, or for any other purpose.

Further affiant sayeth not.

WALTER J. TURNER

Subscribed and sworn to before me this 23rd day of December, 1947.

MARIAN A. HAUGER

Notary Public in and for the State of California,
County of Los Angeles

My Commission Expires June 26, 1951. [26]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Dec. 24, 1947. Edmund L. Smith,
Clerk. [27]

[Title of District Court and Cause]

EXHIBIT 1 TO PETITION FOR INJUNCTION [28]

NLRB 508 (10-20-47)

Copy

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST LABOR ORGANIZATION OR
ITS AGENTS

1. Pursuant to Section 10(b) of the National Labor Relations Act, the undersigned hereby charges that Printing Specialties and Paper Converters Union,
(Name of labor organization or its agent)
Local 388, AFL, at 1543 West Eleventh, Los Angeles, California, has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b), subsections (4)(A) of said Act, in that: (Recite in detail in paragraph 2 the basis of the charge. Be specific as to names, addresses, plants, dates, places, and other relevant facts)
2. It engaged in, induced and encouraged the employees of L. A. Seattle Motor Express and the employees of West Coast Terminals Co. to engage in a concerted refusal in the course of their employment to transport or otherwise handle any goods, articles, materials or commodities of Sealright Pacific, Ltd. for the purpose of forcing or requiring L. A. Seattle Motor Express and West Coast Terminals Co. to cease handling, transporting or otherwise dealing in the products of Sealright Pacific, Ltd., or to cease doing business with Sealright Pacific, Ltd.

Said violations occurred in that, on November 14 and 17, 1947, Printing Specialties and Paper Converters Union, Local 388, AFL, compelled L. A. Seattle Motor Express, under threat of picketing said company, to refuse to handle any freight tendered it by Sealright Pacific, Ltd., at said time L. A. Seattle Motor Express having 5,500 pounds of paper products of Sealright Pacific, Ltd. on its dock to be shipped out of the State of California which L. A. Seattle Motor Express has refused and does now refuse to ship; and said L. A. Seattle Motor Express has refused and does now refuse to handle any products of Sealright Pacific, Ltd., due to the threat of Printing Specialties and Paper Converters Union, Local 388, AFL, to picket L. A. Seattle Motor Express; and on November 17, 1947, Printing Specialties and Paper Converters Union, Local 388, AFL, picketed Berths 232 A and B, Terminal Island, California, and thereby caused longshoremen employed by West Coast Terminals Co. Working at said berths to cease unloading paper supplies shipped via Pan Pacific Lines from New York State to Sealright Pacific, Ltd.

The threats and activities of Printing Specialties and Paper Converters Union, Local 388, AFL, set out in the paragraphs above, and the actions of L. A. Seattle Motor Express and West Coast Terminals Co., above set out, in response to said threats and activities of Printing Specialties and Paper Con-

verters Union, Local 388, AFL, have continued from the dates set forth above to the present and the aforesaid companies and the aforesaid union do now threaten to continue said activities.

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act.

3. Name of Employer Sealright Pacific, Ltd.
4. Location of plant involved 1577 Rio Vista Ave.,
(Street)
Los Angeles, Calif. Employing 135
(City) (State) (Number of workers)
5. Nature of business Manufacturers of paper milk bottle caps and closures and sanitary food containers
6. (Paragraphs 6, 7, and 8 apply only if the charge is filed by a labor organization) The labor organization filing this charge, hereinafter called the union, has complied with Section 9(f)(A), 9(f)(B)(1), and 9(g) of said Act as amended, as evidenced by letter of compliance issued by the Department of Labor and bearing code number The financial data filed with the Secretary of Labor is for the fiscal year ending A Certificate has been filed with the National Labor Relations Board in accordance with Section 9(f)(B)(2) stating the method employed by the union in furnishing to all its members copies of the financial data required to be filed with the Secretary of Labor.

7. Each of the officers of the union has executed a non-communist affidavit as required by Section 9(h) of the Act.
8. Upon information and belief, the national or international labor organization of which this organization is an affiliate or constituent unit has also complied with Section 9(f), (g), and (h) of the Act.

SEALRIGHT PACIFIC, LTD.

(Full name of party filing charge)

1577 Rio Vista Avenue, Los Angeles, Calif.
(Address) (Street) (City) (State)

ANgelus 6104

(Telephone number)

By /s/ Wm. S. Lee

(Signature of representative or person filing charge)

William S. Lee

Executive Vice-President

(Title or office, if any)

Do Not Write in This Space

Case No. 21-CC-13

Date filed 11-18-47

9(f), (g), (h) cleared.....

Subscribed and sworn to before me this 18th day of November, 1947, at Los Angeles, California, as true to the best of deponent's knowledge, information and belief.

/s/ Daniel J. Harrington (Board Agent)

Daniel J. Harrington, Attorney

[Endorsed]: Filed Dec. 29, 1947. Edmund L. Smith,
Clerk. [29-30]

[Title of District Court and Cause]

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PETITION FOR INJUNCTION
UNDER SECTION 10(1) OF THE NATIONAL
LABOR RELATIONS ACT, AS
AMENDED [31]

I. Preliminary Statement

A. Jurisdiction

This proceeding is before the Court on petition filed on behalf of the National Labor Relations Board, herein referred to as the Board, by Howard F. LeBaron, Regional Director of the 21st Region of the National Labor Relations Board, Los Angeles, California, pursuant to Section 10(1) of the National Labor Relations Act, as amended (Pub. Law 101, 80th Cong., Ch. 120, 1st Sess., June 23, 1947) herein referred to as the Act. This petition was filed after preliminary investigation by petitioner of a charge filed by Sealright Pacific Ltd., herein called Sealright, that respondents have engaged in unfair labor practices within the meaning of Section 8(b) 4 (A) of the Act. The unfair labor practices charged were committed at Los Angeles, California, within this judicial district. Respondent Printing Specialties and Paper Converters Union, Local 388, AFL, hereinafter called Local 388, is a labor organization within the meaning of the Act. It has its principal office at Los Angeles, California. Respondent Walter J. Turner is an agent of Local 388 within the meaning of Section 2(13) and 10(1) of the Act. Respondents are engaged in this judicial district in promoting and protecting the interests of employee members of Local 388. This Court has jurisdiction under the provisions of Section 10(1) of the Act.

B. The statute pursuant to which relief is sought

The National Labor Relations Act, as amended, is an exercise of the power of Congress to prevent and mitigate interruptions to interstate commerce arising out of labor disputes which affect such commerce. The constitutionality of such legislation is not open to question. *N. L. R. B. v. Jones & Laughlin Steel Co.*, 301 U. S. 1. For the purpose of protecting the public interest in such commerce, Congress proscribed practices on the part of labor unions and employers which it deemed inimical to the public welfare (Section 1, 8). To effectuate the statutory policy thus declared, and to administer the provisions of the Act, Congress created the National Labor Relations Board, and charged it with the duty, inter alia, of hearing and determining complaints that employers or labor organizations have engaged in the proscribed practices (Section 3, 10). [32] The scheme of the statute permits any person to file with the Board charges that unfair labor practices have been committed (Section 10(b)). Upon the filing of such charges, the Board is authorized to issue a complaint (Section 10(b), 3(d)). The statute further provides that upon the issuance of such a complaint a hearing shall be held and testimony taken (Section 10(b)). Upon such testimony the Board is empowered to issue an order requiring cessation of any unfair labor practice found to have been committed, and requiring the offending party to take such affirmative action as may be necessary to effectuate the policies of the Act (Section 10(b) and (c)). Section 10(e) and (f) provide that such orders issued by the Board may be reviewed in appropriate Circuit Courts of Appeals. The power thus conferred upon the Board to determine whether unfair labor practices violative of Section 8 have

been committed, and the power conferred upon Circuit Courts of Appeals to review Board orders remedying such unfair labor practices is exclusive (Section 10(a), (e), (f)).

However, Congress recognized that unfair labor practices committed by labor organizations under Section 8(b) 4 (A) (B) (C), gave or tended to give rise to such serious and unjustifiable interruptions to commerce that their continuation during the period of investigation, hearing, and consideration between the filing of the charges and the issuance of a final order by the Board remedying such unfair labor practices, would result in irreparable injury to the national policy. Congress, therefore, in Section 10(1) of the Act, made it mandatory upon the officer or regional attorney of the Board to whom such a charge was referred, upon determining after investigation that there is reasonable cause to believe that the charge is true and that a complaint should issue, to file a petition in the appropriate District Court of the United States for appropriate injunctive relief pending final adjudication of the matter by the Board. The instant petition, alleging a violation of Section 8(b) 4 (A), was filed pursuant to this statutory mandate.

C. This Court is empowered to grant injunctive relief pending final relief pending final adjudication by the Board of the alleged violation of Section 8(b) 4 (A)

Section 10(1) of the Act vests jurisdiction to grant appropriate [33] injunctive relief in the appropriate District Courts of the United States "upon the filing," by the designated officer of the Board, of a petition therefor and the notification thereof of the parties affected. The jurisdiction of this Court to grant the relief prayed was

therefore established by the filing of the petition herein and the notification of the parties respondent, who are subject to the jurisdiction of this Court, that this proceeding has been instituted. The parties respondent are properly before this Court (Section 10(1)).

Section 10(1) expressly provides that in granting injunctive relief in Section 8(b) (4) cases pending final adjudication by the Board, the jurisdiction of District Courts shall not be limited by "any other provisions of law." Section 10(h) also provides that, "When granting appropriate temporary relief or a restraining order, * * * the jurisdiction of courts sitting in equity shall not be limited by the [Norris-LaGuardia] Act [47 Stat. 70, 29 U. S. C. § 101]." The jurisdiction conferred upon this Court is therefore entirely statutory and is not limited in any manner other than the limitations contained in the Act itself. That Congress can properly confer such jurisdiction upon the District Courts is settled beyond question. *I. C. C. v. Brimson*, 154 U. S. 447; *Endicott Johnson Corp. v. Perkins*, 317 U. S. 501, 510.

II. Upon the Facts Alleged in the Petition an Injunction Should be Issued Pending Final Adjudication by the Board of the Matters Presented

- A. This Court is required to decide only whether the Board's Regional Director has reasonable cause to believe that the charge herein involved is true and that a complaint should issue thereon

The relief sought is in the nature of an interlocutory injunction. The Board's Regional Director is authorized by the terms of Section 10(1) to petition for injunctive

relief only "pending the final adjudication of the Board with respect to such matters." Consequently, the relief herein sought is limited to such time as may expire before the Board issues its final order in the case arising out of the charges filed with it that respondents have violated Section 8(b) 4 (A). The nature of the relief sought, the entire statutory scheme, as well as the express terms of Section 10(1), demonstrate [34] that the sole prerequisite to the granting of injunctive relief is a finding by this Court that the Regional Director has reasonable cause to believe that the charge is true and a complaint should issue. It cannot be contended that this Court is called upon to decide whether in fact the charge is true, or whether a violation has, in fact, been committed. These issues, as indicated in 1 (B) above, were reserved by Congress for determination by the Board in appropriate proceedings before it, subject to review by the appropriate Circuit Court of Appeals.

1. It is an elementary rule of equity practice that the granting of interlocutory relief pending determination of an issue on the merits does not turn upon a decision as to which party is ultimately entitled to prevail, but upon the existence of facts which indicate reasonable probability that the plaintiff is entitled to final relief. *Douds, Reg. Dir. v. Wine etc. Union*, F. Supp., C. C. A. 13, Labor Cases 564, 186 (D. Ct. S. D. N. Y.); *Bowles v. Montgomery Ward*, 143 F. 2d 38 (C. C. A. 7); *Sinclair Refining Co. v. Midland Oil Co.*, 55 F. 2d 42 (C. C. A. 4); *Northwestern Stevedoring Co., et al v. Marshall*, 41 F. 2d 29 (C. C. A. 9). Indeed, if interlocutory relief could not be granted prior to ultimate determination of the rights of the parties, such relief could not be granted at all; the subject matter of the litigation before

the court might in the meanwhile be destroyed, irreparable injury inflicted, and the judicial process frustrated. Consequently, it is universal equity practice to grant interlocutory injunctive relief where necessary, simply upon a showing of a *prima facie* case for equitable relief. *Bowles v. Montgomery Ward*, *supra*; *City of Louisville v. Louisville Home Telephone Co.*, 279 F. 949 (C. C. A. 6); *Premier-Pabst Sales Co. v. McNutt*, 17 F. Supp. 708; *Walling v. Stylish Embroidery Studio, Inc.*, 63 F. Supp. 343; *U. S. v. Hughes*, 28 F. Supp. 977; *Eastern Texas Railroad Co. v. Railroad Commission of Texas*, 242 F. 300.

2. In providing for interlocutory relief in appropriate cases under the Act, Congress adopted this essential rule of equity practice and conditioned the right to such relief not upon a determination of the ultimate rights of the parties, but upon a determination that reasonable cause exists to believe that a violation has been committed. In addition to the precedents in equity practice, Congress drew upon its own precedents in the Federal Trade Commission Act, 52 [35] Stat. 111, 15 U. S. C. Sec. 53, and the Securities and Exchange Act of 1933 (48 Stat. 86, 15 U. S. C. Sec. 77t), in which administrative agencies had similarly been authorized to obtain interlocutory injunctive relief simply upon a proper showing of "reasonable cause." See *F. T. C. v. Thompson-King & Co.*, 109 F. 2d 516 (C. C. A. 7). Compare, *I. C. C. v. Brimson*, 154 U. S. 447; *Endicott Johnson Corp. v. Perkins*, 317 U. S. 501, 510; *Oklahoma Press Co. v. Walling*, 327 U. S. 186; *N. L. R. B. v. Northern Trust Co.*, 148 F. 2d 24 (C. C. A. 7), *certiorari denied*, 326 U. S. 731; *Goodyear Tire and Rubber Co. v. N. L. R. B.*, 122 F. 2d 450 (C. C. A. 6); *Cudahy v. N. L. R. B.*, 117 F. 2d 692

(C. C. A. 10). Compare also, such federal statutes as R. S. § 1014, 18 U. S. C. § 591, authorizing removal of an accused for trial from one federal district to another.

3. Congress, in providing for interlocutory injunctive relief under Section 10(1) of the Act, did not impose on Board agents the burden of proving, or upon the courts the burden of deciding, that the facts alleged in the charges were true, or that a violation of Section 8(b) 4 had in fact occurred. If the Board agents had been required to establish the truth of the charges as a condition to obtaining an injunction, the entire purpose of the provision for interlocutory relief would be frustrated, for the trial of such issues before the courts would presumably be no less time consuming than would similar proceedings before the Board, which is explicitly directed by statute to process such cases in the most expeditious manner (Section 10(1)). The purpose of providing for injunctive relief pending final determination by the Board was to assure that interstate commerce would not be adversely affected by labor disputes in the time necessarily consumed by trial and consideration of the issues of fact. This purpose hardly can be achieved if those very issues must be decided by the court prior to the issuance of the injunction.

Moreover, if the district courts had been charged with the duty of determining the truth of the charges, or the existence of a violation, a duplication of functions would have been created. For these are the very issues which the Board is empowered to and charged with the duty of deciding in complaint proceedings contemplated by Section 10(b) of the Act, subject to review by the Circuit Courts of Appeals under Section 10(e) and (f). Sections 10(a) of [36] the National Labor Relations Act,

prior to its amendment, expressly provided that the Board's power "to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce * * * shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law or otherwise." In amending Section 10(a), Congress retained the language which provides that the Board's power shall not be affected, etc., but omitted the phrase which vested the power to prevent unfair labor practices exclusively in the Board. The Conference Committee, which drafted the final version of the amendment, explained in its report that the word "exclusive" was omitted because the bill as finally drafted contained "provisions authorizing temporary injunctions enjoining alleged unfair labor practices" and a provision (Section 303 of the Labor Management Relations Act) which authorized private persons to bring suits against labor organizations in federal district courts to recover damages for violations of that Section, which imposes duties on labor organizations similar to the duties imposed upon them in Section 8(b). (H. Rep. No. 510, 80th Cong., 1st Sess., p. 52). Since an injunction issued by a district court pursuant to Section 10(1) would prevent alleged unfair labor practices from continuing, it was no longer appropriate to describe the Board's power to prevent unfair labor practices as "exclusive." But by retaining the provision that the Board's power to prevent unfair labor practices "shall not be affected by any other means of * * * prevention that has been or may be established by * * * law * * *" (Section 10(a)), Congress made it clear that it did not intend the district courts to exercise, in connection with the issuance of interlocutory

injunctions against alleged unfair labor practices, the power vested in the Board to decide whether unfair labor practices had been committed. For, if the district courts decided that question in a suit by a regional officer on behalf of the Board, in which both the alleged violator and the person filing the charge were parties, the decision of the district court, on familiar *res judicata* principles, would be binding upon the Board in the unfair labor case pending before it. See, e. g., *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 402-403; *George H. Lee Co. v. F. T. C.*, 113 F. 2d 583 (C. C. A. 8; [37] U. S. v. *Willard Tablet Co.*, 141 F. 2d 141; *Tait v. Western Md. Ry. Co.*, 289 U. S. 620; *Mitchell v. First Nat'l Bank*, 180 U. S. 471; *New York State Labor Relations Board v. Holland*, 294 N. Y. 480, 63 N. E. 2d 68. Such an exercise of jurisdiction by a district court would "affect" the power of the Board to remedy unfair labor practices in a most drastic fashion. In sum, Congress contemplated, as the Committee report quoted above indicates, that district courts under Section 10(1) would, pending the determination of the issue by the Board on the merits, enjoin "alleged" unfair labor practices, under Section 8(b) 4, provided there is reasonable cause to believe the allegations of the charge to be true, and that only the Board, subject to review by the Circuit Courts of Appeals, would decide the question of the truth of the charges, and issue appropriate "final orders" as provided in Section 10(e). The provision of Section 10(1) which provides for the expiration of any relief which may be granted by district courts upon "final adjudication by the Board with respect to such matter," further demonstrates that only the Board, and not district courts, was empowered, in cases arising out of charges filed with the Board alleging violations of Section 8(b) 4, to decide

whether, in fact and in law, unfair labor practices had been committed. Consequently, if this Court is satisfied that the Regional Director's belief that the charge is true and a complaint should issue, is reasonable, an injunction should be issued as prayed.

B. Upon the investigation made, the Regional Director has reasonable cause to believe that the charge herein involved is true and that a complaint should issue thereon

1. The Regional Director has reasonable cause to believe that the unfair labor practices charged affect commerce within the meaning of Section 2(6), (7), and 10(a) of the Act.

The Regional Director, upon information obtained through his investigation, believes that the unfair labor practices charged affect commerce. Sealright, the charging party, is engaged at Los Angeles, California in the manufacture, sale and distribution of paper food containers. In the course of its business it purchases and causes to be transported to its Los Angeles plant from points outside California various materials valued at an excess of [38] \$1,000,000 annually. It ships various products to points outside California valued at an excess of \$500,000 annually. The unfair labor practices with which respondents are charged tend to interrupt the business of Sealright. On the basis of the applicable authority, the Regional Director's belief that Sealright is engaged in commerce within the meaning of the Act and that the unfair labor practices charged affect commerce within the meaning of the Act is reasonable. *N. L. R. B. v. Fainblatt*, 306 U. S. 601; *N. L. R. B. v. Santa Cruz Fruit Packing Co.*, 303 U. S. 453; *N. L. R. B. v. Sub-*

urban Lumber Co., 121 F. 2d 829 (C. C. A. 3), certiorari 322 U. S. 754; *Brandeis & Sons v. N. L. R. B.*, 142 F. 2d 977 (C. C. A. 8), certiorari denied, 323 U. S. 815; *N. L. R. B. v. Van de Kamp's Holland-Dutch Bakers*, 152 F. 2d 818 (C. C. A. 9); *of. Wickard v. Filburn*, 317 U. S. 111, 118-129.

2. The Regional Director has reasonable cause to believe that the charge against respondents is true.

The investigation of the charges herein made by the Regional Director discloses the following substantially undisputed facts: On or about November 3, 1947 Local 388 called a strike of its members, employed by Sealright, in support of the demands of Local 388 with respect to terms and conditions of employment. On about November 13, 1947 respondent Turner, Secretary-Treasurer of Local 388, advised the Los Angeles Seattle Motor Express, Inc. (hereinafter called L. A. Seattle), a common carrier which has transported Sealright's products, that if L. A. Seattle continued to handle Sealright's products, Local 388 would picket Sealright products handled by L. A. Seattle. On about November 14, 1947 representatives of Local 388 formed a picket line around two trucks loaded with Sealright's products at the terminal of L. A. Seattle. Said representatives informed the employees of L. A. Seattle that the trucks contained hot cargo and told or requested them not to handle it. After November 14, as a result of said picketing by Local 388, the employees of L. A. Seattle refused to transport or handle the goods of Sealright. On about November 17, Local 388 placed a picket line around three freight cars at the docks of West Coast Terminals Co., Long Beach, California (hereinafter called West Coast) upon which rolls of paper consigned to Sealright were being loaded.

As a result of [39] the foregoing conduct of Local 388, and the continued picketing by Local 388 of the docks of West Coast, the employees of West Coast have refused to handle or work on the goods consigned to Sealright. Local 388 is engaged in the conduct summarized above to force or require L. A. Seattle and West Coast to cease handling or transporting the products of Sealright.

On the basis of the foregoing facts there is reasonable cause for petitioner to believe that a violation of Section 8(b) 4(A) has been committed as charged and that a complaint should issue.

Section 8(b) 4(A) of the Act provides that

- (b) It shall be an unfair labor practice for a labor organization or its agents—(4) to engage in, or to induce or encourage the employees of any employer to engage in a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials or commodities, or to perform any services, where an object thereof is
- (A) forcing or requiring any employer or other person to cease using, selling, handling, transporting or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

Petitioner believes that respondents by picketing the goods of Sealright at L. A. Seattle and West Coast have induced and encouraged the employees of L. A. Seattle and West Coast to engage in a concerted refusal in the course of their employment to transport or handle the goods of Sealright, an object thereof being to force or

require L. A. Seattle and West Coast to cease handling or transporting the products of Sealright and that respondents have thereby violated Section 8(b) 4(A) of the Act. This belief, we submit, is clearly reasonable.

- C. Upon the foregoing showing, an order which enjoins respondents, pending final adjudication of the charges by the Board, from [40] engaging in the illegal conduct charged, is just and proper

Section 10(1) embodies the determination of Congress that the continued disruption of interstate commerce by acts which, there is reasonable cause to believe, were perpetrated in violation of Section 8(b) 4, is unjustified and contrary to national policy. Congress placed a mandatory duty upon the officer or regional attorney investigating a charge of violation of Section 8(b) 4 to seek injunctive relief if he believes that a violation has occurred. Congress further declared that "just and proper" injunctive relief should be granted if the Court finds that the officer or regional attorney had reasonable cause to believe that a violation has occurred.

Under these circumstances the propriety of injunctive relief turns not upon traditional equity criteria applicable in suits between private parties, but upon the necessity for effectuating the statutory policy. *The Hecht Company v. Bowles*, Administrator, 321 U. S. 321, 331. It is well settled that where Congress sets the standard for the issuance of injunctions, those standards, and no others, need be satisfied to obtain injunctive relief. *S. E. C. v. Jones*, 85 F. 2d 17 (C. C. A. 2); *S. E. C. v. Torr*, 87 F. 2d 446 (C. C. A. 2); *American Fruit Growers v. United States*, 105 F. 2d 722 (C. C. A. 9); *U. S. v.*

Adler's Creamery, Inc., 110 F. 2d 482 (C. C. A. 2); Douds, Reg. Dir. v. Wine etc. Union, F. Supp., C. C. H. 13 Labor Cases § 64, 186 (D. Ct. S. D. N. Y.).

The scope of the order sought by the Regional Director in the instant case falls well within the "just and proper" criteria established by the Act. The order sought is directed only against the labor organizations and its agents charged with having committed unfair labor practices, and against persons acting in concert with them. *N. L. R. B. v. Regal Knitwear Co.*, 140 F. 2d 746 (C. C. A. 2). The conduct sought to be enjoined is limited to the acts respondents have been charged with committing and to similar acts in violation of Section 8(b) 4. Cf. *N. L. R. B. v. Express Publishing Co.*, 312 U. S. 426; *N. L. R. B. v. May Department Stores Co.*, 326 U. S. 376; *N. L. R. B. v. Cheney California Lumber Co.*, 327 U. S. 385. The order is drawn to prevent a specific evil which Congress desired to eradicate and is therefore clearly warranted under the Act. [41]

III. The Constitution Presents No Bar to the Relief Sought Here

Respondents assert in their motion to dismiss the petition that the picketing engaged in by Local 388 is constitutionally protected and that the relief sought by petitioner infringes the First Amendment's guarantee of freedom of speech, the Fifth Amendment's guarantee of liberty, and the Thirteenth Amendment's prohibition of involuntary servitude.

At the outset it is important to note that whatever the rights of employees may be to leave work individually or in concert or to work on any terms they may themselves choose, those rights are in no way affected by the order

which petitioner here seeks. Neither the refusal of the employees of L. A. Seattle nor that of the employees of West Coast to handle or transport the goods of Sealright constitutes any part of the unfair labor practices which petitioner believes, and has alleged, respondents have committed. The statute does not make it an unfair labor practice for employees voluntarily to cease work for any purpose. Employees as such are not subject to the unfair labor practice provisions of the Act. Congress has thus avoided any possible challenge to the Act which might be predicated upon the Thirteenth Amendment.

The unfair labor practice alleged in the petition and against which the order sought is directed is respondents' action in inducing and encouraging, by means of the picket lines established by Local 388, the employees of L. A. Seattle and West Coast to engage in a concerted refusal in the course of their employment to handle or transport the goods of Sealright, an object thereof being to compel or require West Coast and L. A. Seattle to cease transporting or handling the goods of Sealright.

It follows that the only constitutional question which can be presented here is whether respondents can lawfully be enjoined from encouraging and inducing the employees of L. A. Seattle and West Coast by means of picketing, or any other like acts or conduct, not to handle or transport the goods of Sealright where an object thereof is to compel L. A. Seattle and West Coast to cease handling or transporting the products of Sealright.

Congress, we submit, may, without infringing constitutional guarantees, [42] enjoin picketing such as that engaged in by respondents in the instant case.

In the National Labor Relations Act Congress created a mechanism for the determination of the basic question

whether an employer was required to bargain collectively with a labor organization which sought to represent his employees. Essential to this statutory scheme was the concept of an appropriate bargaining unit generally composed of employees employed by a single employer. It was within this group that Congress sought to vest the power to make the determination whether or not to bargain and by clear implication it was to this group that Congress sought to extend the right, by engaging in concerted activities against their employer, to better their wages, hours and working conditions. In other words, Congress adopted the basic principle that industrial disputes over unionization, wages, hours, and working conditions were to be resolved by the employees in the appropriate bargaining unit on one side and their employer on the other. This principle was not realized under the National Labor Relations Act. Accordingly, Congress addressed itself to this problem in considering amendments to the National Labor Relations Act and by enacting Section 8(b) 4(A) it sought to localize industrial conflict between employees and their immediate employer by prohibiting labor organizations or their agents from inducing or encouraging the employees of any employer to engage in a concerted refusal in the course of their employment to perform services where an object thereof was to force or require that employer to cease doing business with any other person. In other words, Congress sought to prohibit a labor organization from conscripting the aid of employees and through them of their employer who had no immediate relation to a labor

dispute in order to bring pressure to bear upon an employer with whom the labor organization had a dispute over terms and conditions of employment. A familiar weapon used by labor organizations in conscripting such aid and pressure is the picket line placed at the place of business of the neutral employer and calculated, among other things, to induce or encourage his employees to cease handling the products of the employer with whom the labor organization sponsoring the picketing is having difficulties. In proscribing such picketing and thereby narrowing the permissible area of [43] industrial conflict, we believe that Congress did not transgress constitutional limitations.

It has been stated that peaceful picketing may be a phase of the constitutional right of free speech. But, as the Supreme Court has pointed out, even peaceful picketing, which is a form of coercive technique, is subject to regulation in the public interest on any reasonable basis. *Carpenters and Joiners Union of America v. Ritters Cafe*, 315 U. S. 722; *Bakery and Pastry Drivers v. Wohl*, 315 U. S. 769, 775, 776; *Stapleton v. Mitchell*, 60 F. Supp. 51, 58-59.

The Act was enacted by Congress, in the exercise of its power to regulate commerce, to protect "the normal flow of commerce and to present practices" which jeopardize the public health, safety, or interest." Sec. 1 of the Act. And as the Supreme Court stated in *N. L. R. B. v. Jones & Laughlin*, 301 U. S. 1, 36-37: "The power to regulate commerce is the power to enact all appropriate legislation 'for its protection and advancement' (Daniel Ball, 10

Wall. 557, 561); to adopt measures 'to promote its growth and to insure its safety' (*Mobile County v. Kimball*, 102 U. S. 691, 696, 697); to foster, protect, control and restrain' (*Simond Employers Liability Cases*, 223, U. S. 1, 47) * * * That power is plenary and may be exerted to protect interstate commerce no matter what the source of dangers which threaten it." In the exercise of this broad power Congress under Section 8(b) 4 has sought to make unlawful incitation to economic coercion including what is commonly called a secondary boycott. The power of Congress to protect interstate commerce and the public interest from the harmful effects of such boycott cannot be seriously questioned. *Duplex v. Deering*, 254 U. S. 443.

The use of weapons, including picketing, to accomplish a substantive evil forbidden by a valid act of Congress can be made illegal. And we submit, the right peacefully to picket loses its constitutional protection against legislative or judicial infringement when it is, as here, part of a course of conduct calculated to accomplish the evil forbidden by Congress in Section 8(b) 4(A) of the Act. Cf. *Carpenters and Joiners Union v. Ritter*, 315 U. S. 722. [44]

Section 8(c) of the Act does not immunize respondents' conduct. Section 8(c) provides that,

The expressing of any views, arguments, or opinion, or the dissemination thereof * * * shall not constitute or be evidence of an unfair labor practice under any provision of this Act, if such expression contains no threat of reprisal or promise of benefit.

A picket line is more than the expression of views, arguments or opinion. It is, as even respondents' counsel conceded at the oral argument, a coercive technique designed to bring pressure to bear upon, among others, employees so that they will align themselves with the picketing group and aid in advancing its interests. *Ritter, Wohl and Stapleton*, cases, *supra*.

Respondents assert that Section 8(b) 4(A) is vague, indefinite, and uncertain and therefore violative of due process of law. We submit that in view of Section 8(c) of the Act in conjunction with which Section 8(b) 4(A) must be read, "the language Congress used provides an adequate warning as to what conduct falls under its ban, and marks boundaries sufficiently distinct for judges—fairly to administer in accordance with the will of Congress" *N. S. v. Petrillo*, 67 S. Ct. 1538.

The Court, at the oral argument, raised the question whether these proceedings should be heard by a three judge court pursuant to the provisions of Title 28, Sec. 380a of the Judicial Code. That section provides that "no interlocutory or permanent injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part any Act of Congress upon the ground that such Act or any part thereof is repugnant to the Constitution of the United States shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the

same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge." This section, we believe, does not as shown by its express language apply to the instant proceedings. The instant [45] proceedings are before the Court upon the petition of the Board's Regional Director at Los Angeles for injunctive relief against the unfair labor practices with which respondents are charged. The circumstance that respondents have moved to dismiss the petition on constitutional grounds does not transform the instant proceedings into the type of proceedings contemplated by the above-mentioned section of the Judicial Code.

Respectfully submitted,

ROBERT N. DENHAM

General Counsel

DAVID P. FINDLING

Associate General Counsel

WINTHROP A. JOHNS

GEORGE H. O'BRIEN

D. L. MANOLI

Attorneys National Labor Relations Board

January 2, 1947.

[Endorsed]: Filed Jan. 3, 1948. Edmund L. Smith,
Clerk. [46]

[Title of District Court and Cause]

RESPONDENTS' SUPPLEMENTARY MEMORAN-
DUM OF POINTS AND AUTHORITIES [47]

I.

Statement of the Issues

A. The Undisputed Facts

Fairly construed and with conclusions of law eliminated, the petition herein merely charges respondents with picketing and threatening to picket the products of the employer with whom a labor dispute is pending.

A consideration of the petition and the uncontroverted affidavit of respondent Walter J. Turner filed in this proceeding reveals the undisputed facts to be as follows:

- (1) On or about November 3, 1946 Local 388 called a lawful strike of its members, employed by Sealright Pacific, Ltd., in support of the demands of Local 388 for wages and holiday pay more nearly comparable to the prevailing union standards in the paper converting industry in this area, than the final offer made by Sealright after extended collective bargaining negotiations;
- (2) At some time between November 3, 1947 and November 17, 1947 respondent Turner, Secretary-Treasurer of Local 388, advised the Los Angeles-Seattle Motor Express, Inc. that Local 388 was engaged in a strike due to a wage dispute with Sealright Pacific, Ltd., and intended to peacefully picket Sealright's products manufactured under strike conditions and at substandard wages for the purpose of publicizing the dispute and solicit-

ing the assistance of other workers asking that they decline to handle this merchandise.

- (3) On or about November 14, 1947 members of Local 388 on strike at Sealright Pacific, Ltd. formed a peaceful picket line around two trucks loaded [48] with Sealright's products at the terminal of L. A. Seattle, and informed the trucking concern's employees that the Sealright products were manufactured under strike conditions and for substandard wages, or that the products were "hot cargo," and solicited them not to handle the same.
- (4) On or about November 17, 1947 Local 388, peacefully picketed Sealright products being loaded onto three freight cars located at a siding adjacent to the warehouse of the West Coast Terminals Company, Long Beach, California, which products consisted of rolls of paper consigned from a New York plant of Sealright Pacific, Ltd. to the Los Angeles plant of the struck concern for use in continued manufacturing operations.

(Compare Petitioner's Memorandum, pp. 9-10.)

As in the similar case of Bakery Wagon Drivers Local v. Wohl, 315 U. S. 769, 776, the record here does not contain the slightest suggestion that the picketing was anything but completely peaceful. Counsel for petitioner conceded at the hearing upon the order to show cause on December 30, 1947 that the picketing sought to be prevented herein was peaceful, and apparently did not dispute respondents' denial that any threat of reprisal or force accompanied the picketing activity complained of. No circumstances have been charged from which the inference might be drawn that the picketing was attended

or likely to be attended by violence or force, or conduct otherwise unlawful or oppressive; and it is not indicated that there was any actual or threatened abuse of the right to free speech through the use of excessive picketing.

B. The Contentions of Petitioner

Petitioner's contentions as expressed through oral argument on December 30, 1947 and in his Memorandum, may be summarized as follows: [49]

- (1) The Respondents' challenge to the jurisdiction of this Court in this proceeding is disposed of by Section 10(1) of the amended Act, since the constitutionality of such a Congressional enactment under the "Commerce Power" is not open to question.
- (2) The function of this Court in this proceeding is limited by Congress to the issuance of injunctions upon the application of Board agents as an ancillary remedy to assist the National Labor Relations Board in exercising its exclusive power to adjudicate unfair labor practice charges.
- (3) The absolute right of a Board agent to injunctive relief in proceedings such as the instant case is conditioned only upon a determination that "reasonable cause" exists for his stated belief that an unfair labor practice has been committed; however, the Court is not entitled to require prima facie evidence of facts forming the basis for the Board agent's belief in making such determination.
- (4) The First, Fifth and Thirteenth Amendments to the Constitution present no bar to the relief sought here, namely to localize the dispute between the

members of respondent Union and the charging Employer by enjoining respondent Union and its representatives, and all persons in active concert or participation with them, from picketing the products of the struck concern. [50]

II.

Congress Cannot Preclude This Court From Passing on the Validity of a Statutory Provision Purporting to Confer Jurisdiction to Grant Relief Contrary to the First Amendment

Counsel for petitioner seeks to preclude this Court from passing on the validity of Section 8(b) (4) (A) of the amended Act, as incorporated in Section 10(1) thereof, by asserting the following legal propositions:

- (1) This Court received a grant of jurisdiction over this proceeding under Section 10(1); (Petitioner's Memorandum, p. 2, lines 19-20).
- (2) The constitutionality of the amended Act as an exercise of the power of Congress to prevent and mitigate interruptions to interstate commerce arising out of labor disputes which affect such commerce is not open to question. (Petitioner's Memorandum, p. 2, lines 22-25, and p. 14, lines 10-25, citing *N. L. R. B. v. Jones & Laughlin Steel Co.*, 301 U. S. 1 and *Duplex v. Deering*, 254 U. S. 443.)
- (3) The jurisdiction conferred upon this Court by Section 10(1) is entirely statutory, and is not limited in any manner other than the limitations contained in the Act itself. (Petitioner's Memorandum, p. 4, lines 15-17.)

Insofar as counsel seeks to establish by these legal arguments that Congress has the power to regulate interstate commerce by preventing dangerous interruptions thereto, subject to the limitations of the First Amendment, there can be no disagreement. If, however, the contention is being made that this "plenary power" may be exercised without regard for the guarantees of the right of free speech and assembly, we must express strong disagreement with so destructive a concept of constitutional law.

The Jones & Laughlin case 301 U. S. 1, upholding the validity of the [51] original National Labor Relations Act of 1935, did not involve the right of free speech and assembly under the First Amendment. There a corporate employer unsuccessfully invoked the "due process clause" of the Fifth Amendment and the right of trial by jury contained in Article III, Section 2 of the Constitution and the Seventh Amendment, in support of its attack upon the Act.

The invasion of free speech contained in Section 8(b) (4) (A) is also sought to be justified on the authority of an early decision that the so-called secondary boycott lay within the purview of the Sherman Act (*Duplex Printing Co. v. Deering*, 254 U. S. 443), decided a quarter-century ago before "the modern trend of decision" identifying picketing with free speech and assembly.

See dissenting opinion of Mr. Justice Brandeis in the *Duplex* case, 254 U. S. at 481, wherein he queried:

"May not all with a common interest join in refusing to expend their labor upon articles whose very production constitutes an attack upon their standard of living and the institution which they are convinced supports it?"

He also pointed out (254 U. S. at 482) that:

“ . . . courts, with better appreciation of the facts of industry, recognized the unity of interest throughout the union, and that, in refusing to work on materials which threatened it, the union was only refusing to aid in destroying itself.”

Six years later, dissenting in *Bedford Stone Co. v. Journeymen Stone Cutters Association of North America*, 274 U. S. 37, he said:

“ . . . If, on the undisputed facts of this case, refusal to work can be enjoined, Congress created by the Sherman Law and the Clayton Act an instrument for imposing restraints upon labor which reminds one of involuntary servitude.”

We submit that a worker is free, whether “privileged under congressional enactments” or not, “acting either alone or in concert with his fellow workers, to associate or refuse to associate with other workers, to accept, refuse to accept, or to terminate a relationship of employment” (*Hunt v. Cromboch*, 325 U. S. 821) and that “the publication unaccompanied by violence of a notice that the employer is unfair to organized labor and requesting the public not to patronize him is an exercise of the right of free speech guaranteed by the First Amendment which cannot be made unlawful by act of Congress.” (See concurring [52] opinion of Chief Justice Stone in *United States v. Hutcheson*, 312 U. S. 219 at 243.)

III.

The Threat to Free Speech and Assembly Under Section 8(b) (4) (A) Is Heightened Under Petitioner's View of the Limited Discretion Afforded This Court in Performing an Ancillary Function to the Board's Adjudicative Powers Under Section 10

Petitioner contends "the sole prerequisite to the granting of injunctive relief (under Section 10(1)) is a finding by this Court that the Regional Director has reasonable cause to believe that the charge is true and a complaint should issue." (Petitioner's Memorandum, p. 5, lines 1-3.)

"The propriety of such injunctive relief," petitioner further contends, "turns not upon traditional equity criteria applicable in suits between private parties, but upon the necessity for effectuating the statutory policy." (Petitioner's Memorandum, p. 11, lines 11-13.)

Again, "It cannot be contended that this Court is called upon to decide whether in fact the charge is true, or whether a violation has, in fact, been committed." (Petitioner's Memorandum, p. 5, lines 3-5.)

In short, the argument is made by petitioner that the court is required to grant relief upon a petition in compliance with the bare provisions of Section 10(1) as a matter of course, with judicial discretion limited to the scope and extent of the relief granted. It might be expected, rather, that judicial discretion under traditional equity principles, requiring a showing of irreparable injury and the absence of an adequate remedy at law, would be

afforded the Court in view of the nature of the acts proscribed by Section 8(b) (4) of the amended Act.

Petitioner implies that the showing necessary for an injunction against engaging in a strike or concerted refusal to work, or "inducing or encouraging" others to do so need not be any greater than that required for an administrative agency to invoke the assistance of the Court to enforce a subpoena issued in the course of an official investigation. (Petitioner's Memorandum, p. 6, lines 2-11, citing *I. C. C. v. Brimson*, 154 U. S. 447; *Endicott Johnson Corp. v. Perkins*, [53] 317 U. S. 501, and other "subpoena enforcement" cases.)

Moreover, the cases cited by petitioner for the proposition that traditional equity criteria do not apply to the issuance of so-called interlocutory injunctive relief ancillary to an administrative determination do not hold that way at all.

Hecht Company v. Bowles, 321 U. S. 321, involved an application of the OPA Administrator for an injunction under the Emergency Price Control Act against alleged violations of that Act. The trial court denied injunctive relief for want of equity. (49 Fed. Supp. 528.) The United States Circuit Court of Appeals for the District of Columbia reversed on the grounds that the Administrator was entitled to injunctive relief as a matter of course. (137 F. (2d) 689.) The Supreme Court reversed that decision and remanded to the Circuit Court of Appeals to determine whether the trial court had "abused its discretion." Mr. Justice Douglas speaking for the Court says in part:

" . . . Only the other day we stated that 'An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion

which guides the determinations of courts of equity.' . . . We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied. . . . Hence we resolve the ambiguities of §205(a) in favor of that interpretation which affords a full opportunity for equity proceedings under this emergency legislation in accordance with their traditional practices, as conditioned by the necessities of the public interest which Congress has sought to protect."

(321 U. S. 329-330)

Douds v. Wine Workers' Union (D. Ct., S. D. N. Y., decided December 11, 1947), *Fed. Supp.*, 13 C. C. H. Labor Cases pgh. 64,186, 21 LRRM 2120, involved the granting of a five-day temporary restraining order under Sections 8(b) (4) (A) and 10(1) of the amended Act, but any statement therein with regard to the exclusive and controlling character of statutory standards for obtaining injunctive relief is pure dictum, since it was found by the Court that "substantial and irreparable injury to the charging parties will be unavoidable unless a temporary restraining order issues," and "the traditional equity criteria applicable in suits between private parties" were held to be present. Moreover the *Douds* decision misstates the holding in the *Hecht Company* case, *supra*, and [54] cites it for the reverse of the actual holding, in the same manner as petitioner herein.

Such an expression obiter dictum by the judge in the *Douds* case deserves to be accorded less weight than the statements on the subject in *Styles v. Local 74, Carpenters & Joiners* (D. Ct., E. D. Tenn., decided October 28, 1947), *Fed. Supp.*, 13 C. C. H. Labor Cases

pgh. 64,093, 21 LRRM 2010, denying injunctive relief under Sections 8(b) (4) (A) and 10(1) of the amended Act for want of “an existing condition that would warrant the issuance of an injunction as being just and proper,” and lack of “a fair anticipation of future violations.” There District Judge Darr announced:

“The provisions of the Act concerning the injunction give to the court authority to issue such extraordinary process ‘as it deems just and proper.’ Therefore it would seem that the situation should be such as to disclose some immediate urgency of action whereby the right of a citizen would have temporary protection pending the proceedings of the controversy upon its merits.”

IV.

The Portion of the Statute Which Respondents Attack as Unconstitutional Being Clearly an Attempted Abridgment of the Right of Free Speech, Is Not Protected by the Usual Presumption of Constitutionality

The Supreme Court of the United States in a case in which a statute of the State of Texas was not permitted to contravene rights secured by the First Amendment, said:

“The case confronts us again with the duty our system places on this Court to say where the individual’s freedom ends and the State’s power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable

democratic freedoms secured by the First Amendment. . . . That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice." (Emphasis supplied.)

Thomas v. Collins, 323 U. S. 516 at 529

Cited with approval in *In re Porterfield*, 28 Cal. (2d) 91, 168 Pac. (2d) 705.

And, to the same effect: [55]

"There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. See *Stromberg v. Carlson*, 283 U. S. 359, 369, 51 Sup. Ct. 532, 535, 536, 75 L. Ed. 1117, 73 A. L. R. 1484; *Lovell v. Griffin*, 303 U. S. 444, 58 Sup. Ct. 666, 82 L. Ed. 949, decided March 28, 1938."

U. S. v. Carolene Products Co., 304 U. S. 778 at 783 (Note 4)

"We mention these constitutional provisions not to stir the constitutional issues which have been argued at the bar but to indicate the approach which we think should be made to an order of the Chief Executive that touches the sensitive area of rights specifically guaranteed by the Constitution. This Court has quite consistently given a narrower scope for the operation of the presumption of constitutionality when legislation appeared on its face to

violate a specific prohibition of the Constitution.”
(Emphasis supplied.)

Ex Parte Mitsuye Endo, 323 U. S. 283 at 299

“The right to jury trial and the other constitutional rights of an accused individual are too fundamental to be sacrificed merely through a reasonable fear of military assault. There must be some overpowering factor that makes a recognition of those rights incompatible with the public safety before we could consent to their temporary suspension. If those rights may safely be respected in the face of threatened invasion no valid reason exists for disregarding them.”

Duncan v. Kahanamoku, 66 Sup. Ct. 606 at 618
(Concurring Opinion) Hawaiian Martial Law,
January 1946

See also:

Prince v. Massachusetts, 321 U. S. 158 at 167

Schneider v. New Jersey, 308 U. S. 147 at 161

These recent decisions of the Supreme Court represent the culmination of the doctrine suggested by Mr. Justice Holmes in *Schenck v. United States* (249 U. S. 47, 52) and amplified by the concurring opinion of Mr. Justice Brandeis in *Whitney v. California*, 274 U. S. 357, 374. The latter opinion emphasized:

“ . . . although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the state from destruction or from serious injury, political, economic or moral.” [56]

However, the learned jurist quickly added that "Fear of serious injury cannot alone justify suppression of free speech and assembly."

In *West Virginia State Board of Education v. Barnette*, 319 U. S. 624 at 639, the Supreme Court stated:

"The right of a State to regulate, for example a public utility, may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedom of speech and press, of assembly and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect."

V.

The Right of Peaceful Picketing Is Guaranteed Under the First Amendment as Constituting the Right of Free Speech

Senn v. Tile Layers' Protective Union, 301 U. S. 468, 478:

"Members of a union might, without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution."

Carlson v. California, 310 U. S. 106, 112, 113

Cafeteria Employees Union v. Angelos, 302 U. S. 293 at 295

Thornhill v. Alabama, 310 U. S. 88, 102, 104

American Federation of Labor v. Swing, 312 U. S. 321 at 325, 326

In re Blaney, 30 A. C. 648

As elsewhere pointed out herein, the ruling cases upholding the right of peaceful picketing, including those mentioned above, refer to picketing for the purpose of inducing action on the part of other persons. In *Thornhill v. Alabama*, after holding that the picketing therein sought to be enjoined, which consisted of picketing for the purpose of boycott, is protected by the First Amendment as the right of free speech, the Court goes on to say, at 310 U. S. 104:

“It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society.”

The Supreme Court in this language effectually answers the contention of [57] Petitioner herein that peaceful picketing may be outlawed because it may result in damage to the business of another party.

VI.

The Personal Rights Secured by the First Amendment Occupy a Preferred Position and Are Not Judged by the Same Constitutional Principles Which Govern Property Rights

“When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position. As we have stated before, the right to exercise the liberties safe guarded

by the First Amendment 'lies at the foundation of free government by free men' and we must in all cases 'weigh the circumstances and appraise . . . the reasons . . . in support of the regulation of (those) rights. *Schneider v. State*, 308 U. S. 147, 161, 60 Sup. Ct. 146, 151, 84 L. Ed. 155."

Marsh v. Alabama, 326 U. S. 501, 509

In *Follett v. Town of McCormick*, 321 U. S. 573, the Supreme Court in annulling an ordinance purporting to fix a license fee for the sale of books, where the ordinance was sought to be applied to the sale of religious literature, the Court said at page 576:

"We pointed out in the *Murdock* case that the distinction between 'religious' activity and 'purely commercial' activity would at times be 'vital' in determining the constitutionality of flat license taxes such as these. 319 U. S. page 110, 63 Sup. Ct. page 873, 87 L. Ed. 1292, 146 A. L. R. 81. But we need not determine here by what tests the existence of a 'religion' or the 'free exercise' thereof in the constitutional sense may be ascertained or measured. For the Supreme Court of South Carolina conceded that 'the book in question is a religious book'; and it concluded 'without difficulty' that 'its publication and distribution come within the words, "exercise of religion," as they are used in the Constitution.' We must accordingly accept as bona fide appellant's assertion that he was 'preaching the gospel' by going 'from house to house presenting the gospel of the kingdom in printed form.' Thus we have quite a different case from that of a merchant who sells books on a stand or on the road."

See also:

Tucker v. Texas, 326 U. S. 517 at 520

In the Thomas case, 323 U. S. 516 at 529, the Court reaffirmed the views expressed in the Thornhill case, *supra*, that the power of the state to regulate labor relations must not trespass upon the domains set apart for [58] free speech and free assembly, saying:

“Where the line shall be placed in a particular application rests . . . on the concrete clash of particular interests and the community’s relative evaluation of both of them and of how the one will be affected by the specific restriction, the other by its absence. That judgment in the first instance is for the legislative body. But in our system where the line can constitutionally be placed presents a question this Court cannot escape answering independently, whatever the legislative judgment, in the light of our constitutional tradition. *Schneider v. State*, 308 U. S. 147, 161. The answer, under that tradition, can be affirmative to support an intrusion upon this domain, only if grave and impending public danger requires this.” (Emphasis supplied.) [59]

VII.

The Power of a Legislative Body to Pass Legislation for the Prevention of Violence and for General Regulation of Industrial Relations Is Strictly Limited by the Provisions of the Bill of Rights

Hotel & Restaurant Employees Local v. Employment Relations Board, 315 U. S. 437, where the Supreme Court said, at page 442:

“What public policy Wisconsin should adopt in furthering desirable industrial relations is for it to

say so long as rights guaranteed by the Constitution are respected."

A. F. of L. v. Swing, 312 U. S. 321, where the Supreme Court said, at 325 and 326:

"We are asked to sustain a decree which for purposes of this case asserts as the common law of a state that there can be no 'peaceful picketing or peaceful persuasion' in relation to any dispute between an employer and a trade union unless the employer's own employees are in controversy with him.

"Such a ban of free communication is inconsistent with the guarantee of freedom of speech. That a state has ample power to regulate the local problems thrown up by modern industry and to preserve the peace is axiomatic. But not even these essential powers are unfettered by the requirements of the Bill of Rights. The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state. (Emphasis supplied.) A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become a commonplace. *American Foundries v. Tri-City Council*, 257 U. S. 184, 209, 42 Sup. Ct. 72, 78, 66 L. Ed. 189, 27 A. L. R. 360. The right of

free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ."

In discussing the right of free speech in connection with the right of assembly, and disapproving what might be deemed a mild abridgment, the Supreme Court recently said:

"The restraint is not small when it is considered what was restrained. The right is a national right, federally guaranteed. There is some modicum of freedom of thought, speech and assembly which all citizens of the Republic may exercise throughout its length and breadth, which no State, nor all [60] together, nor the Nation itself, can prohibit, restrain or impede. If the restraint were smaller than it is, it is from petty tyrannies that large ones take root and grow. This fact can be no more plain than when they are imposed on the most basic rights of all. Seedlings planted in the soil grow great and, growing, break down the foundations of liberty."

Thomas v. Collins, 323 U. S. 516 at 543

In *Senn v. Tile Layers*, 301 U. S. 468, the Supreme Court said at page 478:

"The state may, in the exercise of its police power, regulate the methods and means of publicity as well as the use of public streets. If the end sought by the unions is not forbidden by the Federal Constitution, the state may authorize workingmen to seek to attain it by combining as pickets, just as it permits capitalists and employers to combine in other ways to attain their desired economic ends."

The corollary of this same thought was reiterated in *Thornhill v. Alabama*, 310 U. S. at 103, namely that:

"It is true that the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. . . . It does not follow that the State in dealing with the evils arising from industrial disputes may impair the effective exercise of the right to discuss freely industrial relations which are matters of public concern."

And again, in the *Carlson* case, 310 U. S. at 113, the Supreme Court declared:

"The power and duty of the State to take adequate steps to preserve the peace and protect the privacy, the lives, and the property of its residents cannot be doubted. But the ordinance in question here abridges liberty of discussion under circumstances presenting no clear and present danger of substantive evils within the allowable area of State control."

Such pronouncements of the high court were considered by the Supreme Court of California in the *Blaney* case decided October 3, 1947, 30 A. C. 648 at 653, which interpreted them to mean that although the purpose of the economic pressure exerted by a labor organization against an employer and the means used to exert it must be lawful, "the question still remains as to what purposes or means may be declared unlawful by the Legislature or the courts without violating the provisions of the Constitution." [61]

In other words, the guarantees of the First Amendment cannot be abridged by legislative action, by municipality, state or the Nation itself. The attempt by the Taft-Hartley Act to prevent a union engaged in a labor dispute with its employer from picketing the product of that employer must be disapproved and annulled, as was the similar attempt by the State of California in the Blaney case, *supra*, or the State of New York in the Wohl case, *supra*.

Similarly, the attempt by means of the Taft-Hartley Law, to draw "the circle of economic competition between employers and workers so small as to contain only an employer and those employed directly by him," must be judicially disapproved and set aside as was the similar attempt of the State of Illinois in *A. F. of L. v. Swing*, *supra*, and the State of New York in *Cafeteria Employees Union v. Angelos*, *supra*.

VIII.

The Right of Picketing Is Protected by Definite Guarantees and Is Controlled by Definite Boundaries

(a) It must be in a dispute reasonably related to employment conditions.

Thornhill v. Alabama, 310 U. S. 88, 102, 103;

Carlson v. California, 310 U. S. 106, 112, 113;

A. F. of L. v. Swing, 312 U. S. 321, 326;

Cafeteria Employees Union v. Angelos, 320 U. S. 293, 295, 296;

McKay v. Retail Automobile Salesmen's Local Union, 16 Cal. (2d) 311, 318, 319;

Smith Metropolitan Market v. Lyons, 16 Cal. (2d) 389, 394.

(b) Picketing is not approved where it is outside of such a controversy reasonably related to employment conditions.

Dorchy v. Kansas, 272 U. S. 306, 311. (Picketing to enforce collection of a stale claim belonging to an individual.)

See:

James v. Marinship, 25 Cal. (2d) 721. (Did not involve picketing but concerned union pressure to preserve a closed shop and a closed union.)

See also:

Bautista v. Jones, 25 Cal. (2d) 746. (Same situation.) [62]

(c) The picketing must be within the economic nexus or context of dispute.

Carpenters and Joiners v. Ritters Cafe, 315 U. S. 722, 727. (Picketing of a product approved.)

Allen Bradley Local 1111 v. Wisconsin Employment Relations Board, 315 U. S. 740, 748. (Picketing the homes of strikebreaker employees disapproved.)

(d) The picketing must be peaceful.

Milkwagon Drivers v. Meadowmoor Dairies, 312 U. S. 287.

(e) Violent acts will be enjoined.

Hotel & Restaurant Employees Local v. Employment Relations Board, 315 U. S. 437, 441. (Mass Picketing—prevention of ingress and egress.)

Lisse v. Local Union, 2 Cal. (2d) 312, 321;

In re Bell, 19 Cal. (2d) 488, 504, 505.

(f) Picketing cannot be limited to a dispute between an employer and his own employees.

A. F. of L. v. Swing, 312 U. S. 321, 326;

Cafeteria Employees Union v. Angelos, 320 U. S. 293, 295, 296.

(g) Picketing within the boundaries thus set out is protected by the courts.

Bakery Wagon Drivers' Local v. Wohl, 315 U. S. 769, 773;

Carpenters' Union v. Ritter's Cafe, 315 U. S. 722, 727;

Stapleton v. Mitchell, 60 Fed. Supp. 51;

Restatement of Torts, Vol. 4, Secs. 798, 799;

Fortenbury v. Superior Court, 16 Cal. (2d) 405;

Park & Tilford Import Corp. v. Int'l. Brotherhood of Teamsters, 27 Cal. (2d) 599, 603, 608.

(h) A person dealing with an employer within such nexus is not a neutral.

Fortenbury v. Superior Court, 16 Cal. (2d) 405, 408;

Goldfinger v. Feintuch, 276 N. Y. 281, 11 N. E. (2d) 910.

In the Memorandum of Points and Authorities on behalf of petitioner herein, the constitutional question as to the right of free speech is touched upon very lightly indeed in three and a half pages beginning at the top of [63] page 12.

The acts sought to be enjoined here consist of peaceful picketing. The picketing is said to be for the purpose of inducing and encouraging certain action on the part of certain employees. The decisions of our highest courts which have upheld the right of peaceful picketing have

involved cases where the picketing was carried on for a definite purpose. In *Thornhill v. Alabama*, 310 U. S. 88, the terms of the statute of the State of Alabama purporting to prohibit peaceful picketing are set out at pages 91 and 92. The statute there does not prohibit picketing carried on as an afternoon's diversion or for the mere purpose of disseminating a piece of news. The statute prohibits picketing pursuant to a boycott to induce or influence members of the public not to patronize a certain establishment. That was the picketing referred to by the Supreme Court at page 95, as freedom of speech and of the press to be safeguarded in order that men may speak as they like on matters vital to them.

In *Senn v. Tile Layers' Protective Union*, 301 U. S. 468, the picketing which was referred to at page 478 as freedom of speech, guaranteed by the Federal Constitution, consisted of picketing to prevent a master tile layer from working as a journeyman in his own business and to "encourage and induce" or "compel," if you please, him to hire a journeyman.

In *Cafeteria Employees' Union v. Angelos*, 302 U. S. 293, the picketing was for the purpose of compelling the owners of a cafeteria who, according to their allegations, did all their own work and made use of no employees whatever, to hire members of the Union.

Similarly, in *A. F. of L. v. Swing*, 312 U. S. 321, the picketing was by members of a beauticians' union to compel the proprietor of a beauty shop to employ union members, there being at that time no union members in his employ.

The very frank admission by counsel for the petitioner at page 13 of the memorandum, lines 11 to 14, to the effect that the intent of the Taft-Hartley Act is to limit the

area of the industrial dispute to a circle comprising only an employer and his own employees flies directly in the face of the consistent rulings of the Supreme Court of the United States, particularly the *Angelos* case, 320 U. S. at page 296 and the *Swing* case, 312 U. S. at pages [64] 325 and 326.

Furthermore, the picketing in the case at bar, as clearly shown by the charge and affidavit on file, was picketing directed at the product of the employer with whom the union is in dispute. Such picketing was expressly upheld in the *Wohl* case, 315 U. S. 769 (by a unanimous decision) which is expressly affirmed in *Carpenters' Union v. Ritter's Cafe*, 315 U. S. 722 at 727.

Counsel for petitioner in their very brief and sketchy citation of authorities, rely upon the *Ritter's Cafe* case, but they fail to consider page 727 of the decision which spells out the principle of law that the picketing of the product of a party to a labor dispute is within the allowable circle of economic action upheld under the First Amendment.

See also *Fortenbury v. Superior Court*, 16 Cal. (2d) 405, where the picketing of a product was upheld as a constitutional right under the rules laid down in the companion case of *McKay v. Retail Automobile Salesmen's Local Union*, 16 Cal. (2d) 311.

"The First Amendment is a charter for government not for an institution of learning. 'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts.

"Indeed, the whole history of the problem shows it is to the end of preventing action that repression is primarily directed and to preserving the right to urge it that the protections are given.

"Accordingly, decision here has recognized that employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty. *National Labor Relations Bd. v. Virginia Electric & P. Co.*, 314 U. S. 469. . . . When to this persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed. But short of that limit the employer's freedom cannot be impaired. The Constitution protects no less the employees' converse right. Of course espousal of the cause of labor is entitled to no higher protection than the espousal of any other lawful cause. It is entitled to the same protection."

Thomas v. Collins, 323 U. S. at 537.

See also Section 8(c) of the amended Act. [65]

IX.

The Relief Prayed For by Petitioner Is Designed to Curtail the Right of Workingmen to Combine For Their Mutual Protection by Restraining Various Concerted Activities, Including Peaceful Picketing and the Boycott, Thereby Requiring Involuntary Servitude Contrary to the Thirteenth Amendment

Petitioner's Memorandum argues that "Congress has . . . avoided any possible challenge to the Act which might be predicated upon the Thirteenth Amendment." Furthermore, "whatever the rights of employees may be to leave work individually or in concert or to work on any terms they may themselves choose, those rights are in no way affected by the order which petitioner seeks herein." (P. 12, lines 7-18.)

"The scope of the order" is defined by petitioner to be such that it "is directed only against the labor organization and its agents charged with having committed unfair labor practices, and against persons acting in concert with them." (P. 11, lines 22-24.)

Actually the proposed order would run against Local 388 and its Secretary-Treasurer, respondent Turner, "and their agents, servants, employees, attorneys and all persons in active concert or participation with them." ("Agent" is defined by Section 2(13) of the amended Act so that "the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling" in the determination of whether "any person is acting as an 'agent' or any other person." (Section 2(1) defines "person" as including inter alia "labor organizations" and "associations." The term "participation" as used in the proposed order is particularly significant in view of the definition of "labor organization" in Section 2(5) as a group "in which employees participate.")

The proposed order seeks to enjoin or restrain the above persons from themselves "engaging in . . . a concerted refusal to work, or strike in the course of their employment for the designated purposes described therein. Therefore, [66] how can it be said with any degree of sincerity that the relief prayed for would not enjoin or restrain concerted activities of union members.

In any event, the fallacious nature of any argument based upon the separation of any unincorporated voluntary association from its membership as a distinct entity is patent to say the least. Whatever may be the rule of law in a particular jurisdiction as to the right of the

union to sue in its own name or the liability of the union to be sued in such fashion, the ultimate enforcement of any injunctive order forbidding picketing must run against the individual members of the union, at least to the extent of denying the right to engage in "concerted activities."

See

Pollock v. Williams, 322 U. S. 4;

Bailey v. Alabama, 219 U. S. 210;

American Federation of Labor v. McAdory, 246 Ala. 1, 18 So. (2d) 810;

Henderson v. Coleman, 150 Fla. 185, 7 So. (2d) 117;

In re Blaney, 30 A. C. 648;

Stapleton v. Mitchell, 60 Fed. Supp. 51.

X.

Section 8(b) (4)(A) Is Void for Vagueness.

Petitioner relies upon an abridged quotation of Section 8(c) of the amended Act to defend Section 8(b) (4)(A) from the attack that it is so vague, indefinite and uncertain as to amount to a denial of due process of law contrary to the Fifth Amendment.

It is significant that petitioner has not responded to respondents' contention that the separability clause set forth in Section 16 of the amended Act cannot save the disputed Section 8(b) (4)(A) from being declared totally invalid, if in fact it is, as claimed, excessively vague or too sweeping in its terms.

Construing Section 8(c) and Section 8(b) (4)(A) together, it would seem to us that peaceful picketing as in the present case cannot be held to constitute an unfair labor practice, since such picketing "contains no threat of reprisal, or force or promise of (specific) benefit." If

the immunized utterances include "the expressing of any views, argument, or opinion, or the [67] dissemination thereof, whether in written, printed, graphic or visual form," we are firmly convinced that peaceful picketing must fall within that category. Yet, counsel for petitioner insists that because picketing is a "coercive technique" it is more than the expression of views, etc. and may be deemed to constitute or serve as evidence of an unfair labor practice. In effect, counsel seeks to turn back the hands of the clock and revive the early judicial pronouncements, long since overruled, that "there can be no such thing as peaceful picketing." (*Atchison etc. v. Gee*, 139 Fed. 582; see also *Pierce v. Stablemen's Union*, 156, Cal. 70, *Rosenberg v. Retail Clerks' Assn.*, 39 Cal. App. 67, and *Moore v. Cooks Union*, 39 Cal. App. 538, all expressly renounced in *Lisse v. Local Union*, 2 Cal. (2d) 312, and *McKay v. Retail Automobile Salesmen's Local Union*, 16 Cal. (2d) 389.

If petitioner is upheld in his contention that peaceful picketing may constitute or serve as evidence of an unfair labor practice under Section 8 of the amended Act, then those portions of said amended Act are so vague that men of common intelligence must necessarily differ as to their meaning. *Lanzetta v. New Jersey*, 306 U. S. 451.

The statute held not subject to this objection in *United States v. Petrillo*, 67 Sup. Ct. 1538, 91 L. Ed. 1403, does not mention "picketing" as such in setting forth the proscribed activities. It refers to "the use *or* express *or* implied threat of the use of force, violence, intimidation, or duress, or implied threat of the use of other means, to coerce, compel *or* constrain" an employer to hire unneeded employees. However, the Supreme Court points out that the "gist of the offense here charged in the statute

and in the information" is that respondent "willfully, by the use of force, intimidation, duress *and* by the use of other means, did attempt to coerce, compel and constrain" the licensee to hire unneeded employees. (Italics are the Court's.) All that the Court holds is that if the allegations that the prohibited result was attempted to be accomplished by picketing are so broad as to include peaceful constitutionally protected picketing, the trial court would be free to strike them, or the Government might amend the information, so that "this case had not reached a stage where the decision of a precise constitutional issue was a necessity." [68]

* * * * *

With respect to the question as to whether these proceedings should be heard by a three judge court pursuant to the provisions of Title 28, U. S. C. A. Section 380a, Counsel for the Respondents are in accord with the view expressed by Counsel for the Petitioner. The various statutes providing for a determination by three judges and direct appeal to the Supreme Court do not apply where an Act of Congress is merely "drawn in question" and may be invoked only where there is an application to restrain enforcement of an Act of Congress. See *International Ladies' Garment Workers Union v. Donnelly Garment Company*, 304 U. S. 243.

Respectfully submitted,

ROBERT W. GILBERT

CLARENCE E. TODD

ALLAN L. SAPIRO

Attorneys for Respondent Local 388

By Robert W. Gilbert

Dated: January 10, 1948. [69]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jan. 10, 1948. Edmund L. Smith,
Clerk. [70]

[Title of District Court and Cause]

MOTION FOR LEAVE TO FILE SUPPLEMENT
TO PETITIONER'S MEMORANDUM OF
POINTS AND AUTHORITIES [71]

To the Honorable Paul J. McCormick, United States District Judge:

Comes now Howard F. LeBaron, Petitioner, by his Attorneys and asks leave to file a supplement to his Memorandum of Points and Authorities, this supplement being the opinion handed down December 31, 1947, by the Honorable S. W. Brennan, United States District Judge for the Northern District of New York, in Civil Action No. 3084 entitled: Charles T. Douds, Regional Director of the Second Region of the National Labor Relations Board, on behalf of the National Labor Relations Board, Petitioner vs. Local No. 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., Respondent, including the Court's letter of transmittal dated January 2, 1948.

ROBERT N. DENHAM

DAVID P. FINDLING

WINTHROP A. JOHNS

DOMINICK MANOLI

GEORGE H. O'BRIEN

Attorney Twenty-First Region, N. L. R. B.

The undersigned counsel for Respondents herein have received copies of the decision hereinbefore referred to and consent to the filing of said decision and letter of transmittal as a supplement to Petitioner's Memorandum

of Points and Authorities, reserving the right to make such written comment thereon as this Honorable Court may allow.

ROBERT W. GILBERT
CLARENCE E. TODD
ALLAN L. SAPIRO

By Robert W. Gilbert

Dated at Los Angeles, California, this 15th day of January, 1948.

[Endorsed]: Filed Jan. 19, 1948. Edmund L. Smith, Clerk. [72]

[Title of District Court and Cause]

ORDER [73]

On motion of Howard F. LeBaron, Petitioner herein, and with the consent of counsel for Respondents, it is hereby:

Ordered

1. Leave is hereby granted to Petitioner to file instanter as a supplement to his Memorandum of Points and Authorities a certain opinion handed down December 31, 1947 by the Honorable S. W. Brennan, United States District Judge for the Northern District of New York, in Civil Action No. 3084 entitled: Charles T. Douds, Regional Director of the Second Region of the National Labor Relations Board, on behalf of the National Labor Relations Board, Petitioner v. Local No. 294, National Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., Respondent, and the Court's letter of transmittal dated January 2, 1948.

2. Leave is hereby granted Respondents to file their comments on said opinion on or before the 19th day of January 1948.

Enter:

PAUL J. McCORMICK

United States District Judge

Dated at Los Angeles this 19th day of January, 1948.

[Endorsed]: Filed Jan. 19, 1948. Edmund L. Smith,
Clerk. [74]

[Title of District Court and Cause]

SUPPLEMENT TO PETITIONER'S MEMORAN-
DUM OF POINTS AND AUTHORITIES [75]

United States District Court

Northern District of New York

Chambers of Judge Stephen W. Brennan

Utica 1, New York

January 2, 1948

Mr. David P. Findling and Mr. Samuel Ross

815 Connecticut Avenue

Washington, D. C.

Mr. John J. Cuneo

120 Wall Street

New York, N. Y.

Mr. Harry Pozefsky

Gloversville, New York

Re: Douds, Regional Director, etc. v. Local 294, etc.
Civil 3084

Douds, Regional Director, etc. v. Local 294, etc.
Civil 3083

Gentlemen:

I am enclosing copy of decision in the Conway case, (No. 3084), and copy of memorandum in the Montgomery Ward case, (No. 3083), the originals of which were filed with the Clerk today. Although I am not sending copies to all attorneys who appeared, I am trying to make certain that both the Washington and New York office of the Board receive a copy, and I am also sending a copy to Judge Walsh.

I am assuming that an appeal will be taken, at least from the order in the Conway case, and it, therefore, becomes important that proper findings and conclusions are made so that the rights of both parties are protected. I suggest that you try to agree upon the findings, conclusions and order, or that each side prepare same, and they can be settled before me.

I think it is evident that I intended that the restraining order in the Conway case, at least insofar as the boycott provision is concerned, would be broad enough to cover all employees, and, therefore, make it unnecessary to issue a second injunction order. If you disagree, I shall be glad to have you make such fact known.

I expect to be holding court in Buffalo during January, but expect to be at my Utica chambers on Saturday of each week.

Allow me to express my appreciation for the manner in which the proceedings were tried, and I assure you that decision would have been given earlier were it not for the press of pending matters.

Very truly yours,

/s/ S. W. Brennan

U. S. D. J.

SWB:C

Enclosure [76]

J-1093a INJ.

United States District Court
Northern District of New York

Civil 3084

----- X
Charles T. Douds, Regional Director of the Second Region
of the National Labor Relations Board, on behalf of the
National Labor Relations Board,

Petitioner,

-vs-

Local 294, International Brotherhood of Teamsters,
Chauffeurs, Warehousemen and Helpers of America,
A. F. of L.,

Respondent.

----- X

Appearances:

Mr. Robert N. Denham

Mr. David P. Findling

Mr. Winthrop A. Johens (sic)

Mr. Samuel Ross

Mr. William W. Kapell

Mr. John J. Cuneo,

Attorneys for Petitioner,
815 Connecticut Avenue
Washington, D. C.

Mr. Harry Pozefsky
Attorney for Respondent
30 South Main Street
Gloversville, New York

Hon. John J. Walsh
Of Counsel,
Utica, New York

Proceeding tried at Utica, New York, December 9-12,
1947; decided December 31, 1947
Brennan, U. S. D. J.

DECISION

This proceeding requires the consideration of the National Labor Relations Act, (hereinafter referred to as the "Act"), as amended by Congress June 23, 1947, by the Labor Management Relations Act, 1947, and popularly known as the Taft-Hartley Labor Act.

A petition has been filed in this Court under the provisions of Section 10(j), and 10(1) of the Act, in which the petitioner prays [77] that an injunction issue restraining the respondent and its agents from engaging in activities which petitioner avers constitute unfair labor practices within the meaning of Section 8 of the Act. The respondent has filed its answer, in substance denying the commission of any activities which might be determined to be unfair labor practices, and further alleges matters in avoidance of petitioner's averments. The proceeding came before the Court through the procedural means of an order to show cause.

A considerable amount of oral evidence was offered by the plaintiff for the purpose of showing the activities of the respondent which are alleged to constitute unfair labor practices. The respondent offered no evidence in contradiction to the evidence of plaintiff's witnesses, and for all practical purposes the decision must be based upon the evidence of the petitioner, and upon the applicable law. Decision of motions made by the respondent was reserved.

The proceeding arises out of a factual situation which may be concisely described as follows. For some years Harry Rabouin has conducted an express or transportation business under the name and style of Conway's Express. The principal place of business is located at

Pittsfield, Mass. with branch terminals at Rensselaer, New York, and Springfield, Mass. The business conducted consists of the transportation of freight by motor truck and trailer over public highways to various destinations in about seven different states.

Prior to September, 1947, Rabouin had leased part of its equipment to the Middle Atlantic Transportation Company located at New Britain, Conn. The leasing arrangement is complicated, but it is sufficient to say that Rabouin was paid upon a mileage and freight weight basis for the equipment so leased. The operators of such equipment were employees of Mid-Atlantic, were under its complete [78] control and their wages were paid by that company. Rabouin's employees, that is, the operators of the Rabouin equipment, used in his own business, were members of the Respondent Union, and Rabouin carried out the terms of a written instrument which is referred to as a contract, which instrument attempted to define the rights of Respondent Union members who were employees of Rabouin. The instrument was not in fact signed by Rabouin, although it appears, as above indicated, that he complied with the obligations thereof. Prior to September 10, 1947, respondent had negotiated with Rabouin to the end that equipment leased by Rabouin should only be operated by union members. Rabouin agreed either to sell the equipment or to arrange for union operators. The arrangement was not carried out. About September 10, 1947, respondent, through its business agent, learned that Rabouin equipment leased to Mid Atlantic had transported or was engaged in transporting freight from New Britain, Conn. to Cleveland, Ohio; the operator of the truck on that occasion not being a member of the union, and, of course, not being an employee

of Rabouin. On September 10, 1947, a strike which still continues was called by respondent against Rabouin. The above statement, together with evidence of acts or occurrences performed or happening during the progress of the strike form the factual background of this proceeding.

Rabouin later filed charges with the Regional Director of the National Labor Relations Board, (hereafter referred to as the "Board"), pursuant to Section 10(b) of the Act, which charges the respondent with having engaged in unfair labor practices as defined in Section 8(b) of the Act. A complaint was thereafter served by the Regional Director upon the respondent, and this proceeding followed.

The specific charges which the petitioner claims constitute [79] unfair labor practices may be concisely stated as follows.

1. The calling of a strike which had for its purpose to force or require Rabouin to cease doing business with the Mid Atlantic Company. (Sec. 8(b) (4)(A).)
2. The refusal to bargain collectively with Rabouin. (Sec. 8(b) (1)(B).)
3. The demand for a closed shop agreement between Rabouin and respondent. (Sec. 8(b) (1)(A).)
4. The demand for the payment by Rabouin to the respondent of money for services not performed or to be performed; to-wit, an amount equal to the wages of a member of Respondent Union for the trip from New Britain, Conn. to Cleveland, Ohio, about September 10, 1947. (Sec. 8(b) (6).)
5. The threatening or coercion of Rabouin's employees. (Sec. 8(b) (1)(A).)

6. The inducing and encouraging by the respondent (sic) of employees of other employers to refuse to receive or deliver articles and materials which had been handled and transported or were to be handled and transported by Rabouin's employees and equipment. (Sec. 8(b) (4)(A).)

The facts as shown by the evidence require little discussion, but there arose sharp differences of opinion as to the extent of the power of the Court to grant relief herein, and the procedure to be followed in arriving at a determination as to whether or not such power should be exercised.

Since the litigants herein fail to agree as to the meaning of the statute upon which the proceeding is based, on the extent of the Court's jurisdiction, upon the relief which may be granted, and the procedure to be followed in the granting or denial of such relief [80] reference is made to the statute itself and to the principles which must govern the decision of the disputed contentions.

Arguments addressed to the fairness or efficiency of the statute are of no value here. Congress alone has the legislative power. The courts may only construe, apply and enforce the statute in accordance with the language and intent thereof. They are not concerned with whether or not the litigants consider the statute either good or bad.

A reading of the Act under consideration leads to the conclusion that, as far as material here, Congress has defined certain activities of employers and employees as unfair labor practices, and devised a means and procedure whereby such practices may be halted. It has also provided procedure by which activities, which are charged by any aggrieved person to amount to unfair

labor practices, may be prohibited or regulated during the time necessarily consumed in the ultimate determination of the facts constituting such charges. (Sec. 10(j) and (1).) It is with the latter procedure and subsections of the Act with which we are primarily concerned in this proceeding.

It is plain that the remedy proscribed takes the form of injunctive relief, and it is equally clear that the Board has the exclusive power to determine whether unfair labor practices have been committed and to issue the appropriate orders upon such determination. (See Sec. 10(a) (e) and (f).)

The procedural steps have been taken herein, and the Board seeks the order of this Court prohibiting the commission of such acts pending its final action and determination. We are concerned here primarily with the temporary relief which may be afforded under the provisions of Sec. 10(j) and (1) of the Act.

The primary purpose of the Act is to promote and safeguard [81] the free flow of commerce. It is recognized that employers, employees and the public are affected thereby, and the Act must be construed in the light of their interest therein.

In this proceeding the Board has invoked the discretionary power invested by Sec. 10(j), and has complied with the mandate of Sec. 10(1), in the institution of this proceeding; it being evident from the language of the last sub-section that Congress determined that unfair labor practices loosely described as boycotts were especially harmful to the public interest. The measure of the court's jurisdiction is similar in both sub-divisions (j) and (1); to-wit, to grant such injunctive relief or

temporary restraining order as it deems just and proper. No other grant or limitation of power is found.

Respondent contends with earnestness that the provisions of the Norris-LaGuardia Act (29 U. S. C. A. 101-115), which substantially eliminates the granting or use of the injunction in labor disputes must be applied here, or at least the bases of irreparable injury, and lack of an adequate remedy at law must be shown before the petitioner may be granted injunctive relief. Both contentions are rejected. The relief provided is entirely statutory. The common law requirements do not apply. The statutory scheme is complete in itself.

“As the issuance of an injunction in cases of this nature has statutory sanction, it is of no moment that the plaintiff has failed to show threatened irreparable injury or the like, for it would be enough if the statutory conditions for injunctive relief were made to appear. *Securities and Exchange Commission v. Jones* (C. C.....), 85 F. (2nd) 140.”

Securities and Exchange Commission v. Torr, 87 F. 2nd 446 at 450, and See also

Bowles v. Swift & Co., 56 F. Supp. 679 and cases cited.

To impose the limitations of the Norris-LaGuardia Act upon the [82] Act would be to impute to Congress an intention to grant to the Court a jurisdiction with restrictions thereon which would prevent its exercise. No evidence of Congressional intent is drawn from the language

of Sec. 10(h) which specifically excludes the limitations of the Norris-LaGuardia Act from effecting injunctive relief applied for after the making of an order by the Board. This provision was carried over from the original Act, and has no effect upon sub-divisions (j) and (1) which are new provisions in the amended Act. Neither does the phrase "notwithstanding any other provisions of law" as found in Sec. 10(1) indicate that Congress intended that a different statutory requirement must be applied to the jurisdiction of the Court under 10(j) and 10(1). When the Court is given jurisdiction without limitation, the Act means just that; the phrase may be considered as surplusage. Certainly, it can not be used to imply a limitation upon another sub-section where the phrase is not found.

Since this Court has jurisdiction to render only intermediate relief, it would seem logical that something less than a finding of the ultimate facts is contemplated in the Act. To hold otherwise is to subject both petitioner and respondent to two trials, for the Act plainly contemplates a trial by the Board. This Court does not decide which litigant is ultimately entitled to prevail.

While all of plaintiff's evidence was offered and received herein, it is concluded that such detail was neither contemplated by the Act or necessary in fact. There is nothing in the statute which would prompt the Court to depart from the recognized rule of equity that interlocutory relief may be granted upon a showing of reasonable probability that the moving party is entitled to

final relief. A showing of a prima facie case for equitable relief [83] satisfies the statute.

Bowles v. Montgomery Ward & Company, 143 F. 2nd 38 at 42;

Northwestern Stevedoring Company vs. Marshall, 41 F. 2nd 28;

Sinclair Refining Co. vs. Midland Oil Company, 55 F. 2nd 42.

The requirement is the same under either 10(j) or 10(1). The provision of the latter subsection; viz: "If, after such investigation, the officer or regional attorney to whom the matter may be referred, has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States—," is the measure of the requirements which must exist before such officer is required to petition this Court for the authorized relief. It is not the measure of the proof required before this Court may grant such relief.

The requirements of a prima facie case are met when the factual jurisdictional requirements are shown, and credible evidence is presented which, if uncontradicted, would warrant the granting of the requested relief, having in mind the purpose of the statute and interests involved in its enforcement. Such requirement has been met in this proceeding, and petitioner is entitled to relief.

There remains to be considered the type and extent of relief which is considered "just and proper" under the Act. The Court is aware of the frequent admonition

that injunctive relief is not lightly granted, and that such relief looks to the future rather than the past. The Court also appreciates that such rules are applied with different degree of rigidity in private litigation, and when the public [84] interest is involved. (U. S. v. Morgan, 307 U. S. 163 at 194.) In any event injunctive relief may only enjoin those activities which are condemned in the Act. The evidence here tends to establish acts of the respondent constituting unfair labor practices. Such acts are not isolated, but rather are deliberate, wilful and, if not continuous, at least sporadic. No evidence of respondent's efforts to alter its position in reference to such acts is offered. In addition, the Court may consider a similar proceeding instituted in this Court against the same respondent requesting relief under Section 10(1). The above proceeding, based upon the complaint of Montgomery Ward and Company, was instituted at the same time; the order to show cause was returnable at the same time, and the evidence was taken immediately following the trial of the instant proceeding. The decision therein is filed concurrently herewith. In fact, reference to such proceeding is contained in respondent's answer.

The conclusion is reached that the motions made by respondent should be denied, and that an order should issue restraining the respondent from the commission or continuance of the activities set forth in Paragraph "6" of the petition.

Order may be settled on three days' notice.

Stephen W. Brennan

U. S. D. J. [85]

United States District Court
Northern District of New York

Civil 3083

----- X

Charles T. Douds, Regional Director of the Second Region
of the National Labor Relations Board, on Behalf of the
National Labor Relations Board,

Petitioner

-vs-

Local 294, International Brotherhood of Teamsters,
Chauffeurs, Warehousemen and Helpers of America,
A. F. of L.,

Respondent

----- X

Appearances:

Mr. Samuel Ross

Mr. William W. Kapell

815 Connecticut Avenue

Washington, D. C.

Mr. Bertram Diamond

120 Wall Street

New York City

Attorneys for the National Labor Relations Board

Mr. George V. Brown

Attorney for Montgomery Ward & Company

75 Varick Street

New York, N. Y.

Mr. Harry Pozefsky

Attorney for Respondent, Local 294

Gloversville, New York

Tried December 15-16, 1947; Decided December 31, 1947
Brennan, U. S. D. J.

MEMORANDUM

This proceeding is similar to and may be considered as a companion proceeding to No. 3084, decision in which is filed concurrently herewith, although Section 10(1) of the Labor Management Relations Act, 1947, alone is involved herein.

This proceeding arises out of the following factual situation. Montgomery Ward & Company maintain a place for the transaction of business near Albany, New York, and is engaged in the sale of merchandise. [86] It hires no truck operators; it has no contractual relationship with, and none of its employees are members of the respondent union.

On or about October 15, 1947, the business representatives of the respondent were advised by a guard employed by Montgomery Ward that they must have a pass in order to remain upon the company's property. Such representatives without making themselves known or without attempting to obtain the necessary passes then required operators of transportation equipment, who were members of respondent union, to leave the premises and to refrain from entering thereon. This action resulted in an inability or refusal to handle incoming or outgoing Montgomery Ward merchandise. The situation existed approximately forty-eight hours. No settlement was made, but thereafter it is apparent that respondent union officials allowed or permitted drivers to resume their regular activities insofar as they affected Montgomery Ward and Company.

There was no strike and no dispute between the Montgomery Ward Company and any of its employees.

A charge was filed by Montgomery Ward & Company against the respondent based upon the above facts, which in substance charged that the acts of the respondent, as described above, constituted an unfair labor practice in violation of Section 8(b) (4)(A) of the Act. The charge was followed by the usual procedure and later this proceeding was instituted.

It will serve no purpose to discuss again the legal issues and conclusions which are set forth in the proceeding No. 3084, above referred to. Neither is it necessary to refer to the evidence offered herein. It is sufficient to state that the evidence indicated a course of conduct on the part of respondent's agents which appears to be without justification either in law or in fact. [87]

The conclusion is readily reached that the petitioner is entitled to the relief requested in the petition, but inasmuch as a restraining order is granted to the petitioner against the same respondent in case No. 3084, above referred to, it would seem unnecessary that an additional injunction should issue, and this proceeding is retained upon the docket of this Court pending the final determination of the issues involved herein by The National Labor Relations Board. Petitioner, however, upon showing the necessity for the issuance of an injunction herein may apply to this Court for such relief upon twenty-four hours' notice.

Stephen W. Brennan
U. S. D. J.

[Endorsed]: Filed Jan. 19, 1948. Edmund L. Smith,
Clerk. [88]

[Title of District Court and Cause]

REPLY TO PETITIONER'S SUPPLEMENTARY
MEMORANDUM OF POINTS AND AU-
THORITIES [89]

With the readily granted consent of the undersigned, counsel for petitioner has cited to your Honor, after submission of the above-entitled matter on December 30, 1947, two recent decisions by the United States District Court for the Northern District of New York, construing Section 10(j), 10(1), and 8(b) (4)(A), (B) and (C) of the National Labor Relations Act, as amended June 23, 1947. (*Douds v. Local 294, Int'l. Brotherhood of Teamsters*, 13 CCH Labor Cases, Pgh. 64,214 and Pgh. 64,215, 21 LRRM 2150 and 21 LRRM 2154, decided January 2, 1948.)

While in general terms District Judge Brennan discusses the issue of whether traditional equity discretion remains vested in the court under the statutory proceedings called for by Sections 10(j) and 10(1) of the amended Act, this opinion does not bear out petitioner's contention as to the extent of the showing required of the Board's agent herein. (The constitutional questions are not even considered.)

In the "Conway's Express" case (No. 3084), and presumably also in the "Montgomery Ward" case (No. 3083)—

"a considerable amount of oral evidence was offered by the plaintiff for the purpose of showing the activities of the respondent which were alleged to constitute unfair labor practices. The respondent offered no evidence in contradiction to the evidence

of plaintiff's witnesses, and for all practical purposes the decision must be based upon the evidence of the petitioner, and upon the applicable law."

(Decision, Case No. 3084, p. 2; 13 CCH Labor Cases page 74,424; 21 LRRM at 2151.)

The theory advanced by counsel for petitioner in the present case is that the verified petition of the Board's agent, Regional Director LeBaron, reciting that he "has reason to believe and believes that respondents have engaged in and are engaging in conduct in violation of Section 8(b) subsection (4)(A) of the Act" (Petition p. 3) is per se an adequate showing for injunctive relief upon an order to show cause pursuant to Section 10(1) of the amended Act. This contention stands or falls on the accuracy of Petitioner's claim that under Section 10(1) "injunctive relief should be granted if the Court finds that the officer or regional attorney had reasonable cause to believe that a violation has occurred." (Petitioner's Memorandum, p. 11, lines 8-10) [90]

The "Conway's Express" case (No. 3084) cited by petitioner to support this theory, actually holds to the contrary, as is demonstrated by this language from the decision:

"The requirement is the same under either 10(j) or 10(1). The provision of the latter subsection, viz 'If after such investigation, the officer or regional attorney to whom the matter may be referred, has reasonable cause to believe such charge is true and

that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States—' is the measure of the requirements which must exist before such officer is required to petition this Court for the authorized relief. It is not the measure of the proof required before this Court may grant such relief."

(Decision, Case No. 3084, p. 8; 13 CHH Labor Cases, page 72,426; 21 LRRM at 2154, Emphasis supplied.)

According to District Judge Brennan, "the requirements of a prima facie case are met when the factual jurisdictional requirements are shown and credible evidence is presented which, if uncontradicted, would warrant the granting of the requested relief." (Ibid.)

In any event, we believe that these nisi prius decisions are only entitled to slight persuasive authority, if any, in passing upon the statute here under attack. (See Respondents' Supplementary Memorandum, p. 8-9, discussing *Douds v. Wine Workers' Union* (D. Ct., S. D. N. Y., decided December 11, 1947) 13 CCH Labor Cases, Pgh. 64,186; 21 LRRM 2120, and *Styles v. Local 74, Carpenters & Joiners* (D. Ct., E. D. Tenn., decided October 28, 1947), 13 CCH Labor Cases, Pgh. 64,093; 21 LRRM 2010). They do not relate to the constitutional issues at all.

The difficulty of giving weight to such lower court decisions construing the amended National Labor Relations Act is emphasized by the statutory scheme as out-

lined by counsel for petitioner, which permits the United States District Courts, the Board's Trial Examiner, the National Labor Relations Board itself, and the United States Circuit Court of Appeals to apply the law to the same facts, at various stages of the "unfair labor practice" proceedings under Section 10.

Thus, following the decision in *Styles v. Local 74, Carpenters & Joiners*, *supra*, denying injunctive relief under Section 8(b) (4)(A) as incorporated in [91] Section (101), Trial Examiner J. J. Fitzpatrick recommended that a cease and desist order be issued against Local 74 for violation of that identical portion of the Act, in *Matter of Watson's Specialty Store and Local 74, Carpenters & Joiners*. The trial examiner's recommendation (which under Section 10(c) automatically becomes the order of the Board if no appeal is taken therefrom within 20 days) states in part:

"With all due deference to the findings of Judge Darr, it is clear that the facts as presented to him in the injunctive hearing are not identical with the evidence as testified to by witnesses in the present proceeding. . . . In this type of case the tribunal exclusively authorized to try the case on the merits is the National Labor Relations Board."

(21 L. R. R. 99 at 100; Report No. 380, CCH Labor Law Reports p. 6.)

We submit that the appellate courts will have to pass upon the constitutionality of the Act before any conclusive authority will exist regarding the same, and that the *Wine Workers' Carpenters & Joiners'*, and *Teamsters'* cases are barely persuasive at most. They are really no more helpful to the disposition of the instant

case than the finding of Trial Examiner Fitzpatrick in Watson's case that peaceful picketing is privileged under Section 8(c) of the Act, and therefore may not constitute or serve as evidence of an unfair labor practice under Section 8(b) (1)(A).

Respectfully submitted,

ROBERT W. GILBERT

CLARENCE E. TODD

ALLAN L. SAPIRO

Attorneys for Respondent Local 388

By Robert W. Gilbert

Dated: January 19, 1948. [92]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jan. 19, 1948. Edmund L. Smith,
Clerk. [93]

[Title of District Court and Cause]

MEMORANDUM OF RULING AND ORDER
GRANTING INJUNCTION UNDER SECTION
10(1) OF THE NATIONAL LABOR RELA-
TIONS ACT, AS AMENDED

Sealright Pacific Ltd., manufacturers of paper milk bottle caps and closures and sanitary food containers (hereinafter called Sealright), under the authority of Section 10(b) of the Labor-Management Relations Act, 1947 (hereinafter referred to as the Act), filed with the National Labor Relations Board (hereinafter called the Board), a charge that Printing Specialties and Paper Converters Union, Local 388, A. F. L. (hereinafter called

the Union), has engaged in "unfair labor practices" within the meaning of Section 8(b), subsection 4(A) of the Act, affecting commerce within the terms of Section 2(6) and (7) of the Act.

The charge was duly referred to the Regional Director of the Board for investigation.

Howard F. LeBaron, the accredited and designated [94] officer of the Board, has officially investigated such charge and as the result of his preliminary investigation he avers in a petition pending before the court his belief in the verity of the charge preferred by Sealright and he asseverates that a complaint based upon such charge should issue against the Union and its secretary-treasurer.

In line with the expressed Congressional purpose and policy of the amendment to the National Labor Relations Act as legislatively declared in Section 1(b) of the Act and conformable to the rewritten Findings stated in the Act (Title 29, Section 151, U. S. C. A.), and as required by the terms of Section 10(1) thereof, the accredited Regional Director, upon his supplementary factual ascertainment on behalf of the Board, petitions this court for appropriate injunctive relief against the Union and its above named officer pending final adjudication of the charge of Sealright against the Union.

In his verified petition the investigating Regional Director specifies as the basis and reason for his belief that injunctive process of this court is necessary as an aid and cooperative instrumentality to the Board during its consideration, and until its decision in the matter of Sealright's charge of unfair labor practices by the Union,

the following factual situation concomitant to the dispute between Sealright and the Union:

- “(a) Sealright Pacific Ltd. is a corporation organized under and existing by virtue of the laws of the State of California. Its principal office and place of business is located at 1577 Rio Vista Avenue, Los Angeles, California, where it is engaged in the manufacture, sale and distribution of paper food containers and milk bottle caps. In the course and conduct of its business, it purchases and causes to be transported to its Los Angeles plant from points outside the [95] State of California, paper, steel, shipping cases, etc., all valued at an excess of \$1,000,000.00 annually. Its finished products comprising milk bottle caps, milk bottle closures and food containers, are valued at an excess of \$1,000,000.00 annually and more than 50 per cent of such products are shipped outside the State of California.
- (b) Los Angeles Seattle Motor Express, Inc. (hereinafter called L. A. Seattle), 1147 Staunton Avenue, Los Angeles, is a common carrier operating motor trucks between Los Angeles and points in the Pacific Northwest. It has carried Sealright's products for a number of years.
- (c) On November 13, 1947, respondent Walter J. Turner (vice-president) of Local 388, advised L. A. Seattle that if it continued to handle Sealright's products, L. A. Seattle would be picketed by Local 388.
- (d) On about November 14, 1947, representatives of Local 388 followed two trucks loaded with Seal-

right's products to the L. A. Seattle terminal where by forming a picket line around the two trucks containing the products of Sealright and telling the employees that the trucks contained "hot cargo" and not to "handle it," induced and encouraged the employees of L. A. Seattle, by orders, force, threats, or promises of benefits, not to transport or handle the goods of Sealright. After November 14, 1947, as a result of the above conduct of Local 388 the employees of L. A. Seattle refused to transport or handle the goods of Sealright. Local 388 engaged in the foregoing conduct to force or require L. A. Seattle to cease handling or transporting the products of Sealright.

- (e) West Coast Terminals Co. (hereinafter called West Coast), is a public wharfinger with its docks and wharves located on Pier A, Berths 2 and 3, Terminal Island, Long Beach (2), California. On or prior to November 17, 1947, West Coast received from Panama Pacific Lines Vessel S. S. Green Bay Victory, a consignment of rolls of paper destined for Sealright's Los Angeles plant.
- (f) On November 17, 1947, while employees of West Coast were engaged in loading the rolls of paper onto freight cars consigned to Sealright in Los Angeles, a group of pickets representing Local 388 [96] appeared at the docks of West Coast and, by forming a picket line around the freight cars being loaded with the rolls of paper for Sealright, induced and encouraged the employees of West Coast, by

orders, force, threats, or promises of benefits, not to handle or work on the paper consigned to Sealright. Since November 17, 1947, as a result of the above conduct of Local 388 and the continued picketing by Local 388 of the docks of West Coast, the employees of West Coast have refused to handle or work on the goods consigned to Sealright. Local 388 engaged in the foregoing conduct in order to force or require West Coast to cease handling or transporting the products of Sealright."

Upon motion of George H. O'Brien, Esq., one of the accredited attorneys of the Board, an order to show cause has been issued directed to the Union and to Mr. Walter J. Turner, an officer thereof, requiring the showing of cause herein by them why pending final adjudication by the Board with respect to the matter of the accused unfair labor practices they should not be enjoined and restrained from continuing such activities.

Both respondents duly appeared on the return day of the order to show cause and through their attorneys, Messrs. Gilbert, Todd and Sapiro, they interposed a motion to dismiss the Board's petition for injunction upon jurisdictional grounds that the invoked sections 8(b), (4), (A) and 10(1) are violative of Amendments I, V and XIII of the Constitution of the United States.

In support of the motion the respondents filed simultaneously therewith an affidavit of Mr. Turner, recounting various steps that have occurred in a labor dispute relating to wage rates and holiday pay between the Union as the collective bargaining agency of the production employees of the Los Angeles plant of Sealright and

such corporation which he avers culminated in a strike of [97] 67 of the approximately 70 production workers in such local plant of Sealright on November 3, 1947.

The only variance between the factual situation ascertained by the Regional Director of the Board and specified in his verified petition and that attested in the affidavit of Mr. Turner in his statement that the picketing at each of the described locales was "peaceful."

While, in conformity to the rule enunciated by the Supreme Court in *Hecht Co. v. Bowles*, Admr., 321 U. S. 327, 329, we have given appropriate consideration to all of the evidential material before the court, we have concluded that under the unequivocal procedural mandates incorporated in the Act, a finding should be made, and is accordingly made, in this proceeding of the existence of "reasonable cause" for the Regional Director's belief that an "unfair labor practice" as defined in Section 8(b), (4), (A), has occurred.

Therefore it seems clear that the specific injunctive processes expressly conferred upon this court by Section 10(1) of the Act become operable upon the credible petition of the administrative agency as provided in the Act, unless some constitutional limitation supervenes to forestall the restrictive restraint which the Act provides for the situation before us in this matter. *Switchmen's Union v. National Mediation Board*, 320 U. S. 297. *Endicott Johnson Corp. v. Perkins*, 317 U. S. 501, 510; *United States v. San Francisco*, 310 U. S. 16, at pages 30, 31; *Securities & Exchange Comm. v. Torr et al.* (C. C. A. 2), 87 F. 2d. 446; *Otis & Co. v. Securities & Exchange Comm.* (C. C. A. 6), 106 F. 2d, 579, at page 583; *Walling, Admr. v. T. Buettner & Co.* (C. C. A. 7), 133 F.

2d. 306; Henderson, Admr., etc. v. Burd et al., 133 F. 2d. 515, 517; Bowles v. Swift & Co., [98] 56 F. Supp. 679; Porter, Admr. v. Elliott, 5 F. R. D. 223, at page 225; Douds, Regional Director, N. L. R. B. v. Local 294 International Brotherhood of Teamsters, etc., A. F. L. (D. C., N. D. N. Y.), decided December 31, 1947.

Before turning to the very delicate constitutional issue that is involved under the established concrete factual situation before the court, attention should be given to the significant and broad change in legislative policy that is definitely declared and clearly expressed by Congress relative to the use of injunctive processes available in the District Court to ameliorate the public interests in the federal area of labor disputes. Not only is it stated in Subsection (h) of Section 10 of the Act that the equitable jurisdiction of federal courts is no longer to be circumscribed by limitations specified in the Act approved March 23, 1932, 29 U. S. C. A., Section 101, et seq. (Norris-LaGuardia Act), but Subsection (1) of Section 10 further amplifies the National policy of utilizing appropriate judicial injunctive methods in the specific activities that are made unlawful in Section 8(b), (4), (A), of the Act "notwithstanding any other provision of law."

It is evident that unless the decisions of the United States Supreme Court indisputably show the unconstitutionality of Section 8(b), (4), (A) of the Act as incorporated in the new restraint processes now applicable in labor disputes pursuant to the limitations in Section 10(1) of Labor management Relations Act, 1947, this court should grant an appropriate injunction auxiliary to the proceedings in the Board and until the labor dispute

pending before the Board is finally adjudicated by the Board.

The substantive provisions of the Act that are here challenged as constitutionally assailable read thus: [99]

“It shall be unfair labor practice for a labor organization or its agents—

to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person.”

We find no support whatever, under the record before us or within the provisions of the Act that are involved in this matter, for a finding or conclusion that the Thirteenth Amendment has been transgressed.

We are not here considering a criminal statute or parts of an act which relate to outlawed activities characterized as crimes.

The measure involved pertains solely to activities classified in the law as torts, or in other words, wrongs of a civil nature, and the inherent and statutory rights of

employees, as such are preserved by saving provisions in the Act, which read thus:

“Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act.”

The provisions of the Act under scrutiny are products of legislation that clearly under the Constitution is within the power of Congress to enact. *Labor Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 46. They are regulatory [100] statutes directed at the control of acts and practices of labor organizations and their agents in the field of interstate commerce that to Congress seemed contrary to the public interest and inimical to general welfare.

The words employed by the legislative body to reach the evil contemplated are clear and precise. It is only coercive and compulsive conduct that is proscribed, and even measured by the stricter rule which applies to criminal statutes Section 8(b), (4), (A), is not unconstitutionally vague or indefinite. See *United States v. Petrillo*, 332 U. S. 1.

But it is contended that the provisions of the Act upon which the Regional Director, on behalf of the Board, seeks injunctive relief from this court infringe the freedom of speech and assembly guaranteed to all by the due process clause of the Fifth Amendment and by the First Amendment to the Constitution. We think such contention untenable in the situation before us.

It will of course be admitted that the statute, doubtless designated by Congress to effect a practical and beneficial purpose in the federal regulation of industrial controversies, should be upheld if it can be construed in harmony with the fundamental law, and as stated by the Supreme Court in *Brown v. Walker*, 161 U. S. 591 at page 596:

“Instead of seeking for excuses for holding acts of the legislative power to be void by reason of their conflict with the Constitution, or with certain supposed fundamental principles of civil liberty, the effort should be to reconcile them if possible, and not to hold the law invalid unless, as was observed by Mr. Chief Justice Marshall, in *Fletcher v. Peck*, 6 Cranch 87, 128, ‘the opposition between the Constitution and the law be such that the judge feels a clear and strong conviction of their incompatibility with each other.’”

We think it indisputable that if the factual [101] situation disclosed by the Regional Director is considered realistically it will be manifest that an object of the picket line at “L. A. Seattle Terminal” and at the harbor in Long Beach, California, was coercion, and the type of coercion that is attended with serious repercussions and dire consequences upon the interests of the

two strangers to the labor dispute between Sealright and the Union. Cf. *Bakery Drivers Local v. Wohl*, 315 U. S. 769.

The picketing activities, which prompted the representatives of the Board to petition the court for injunctive relief, can in truth hardly be said to have been motivated by "dissemination of information concerning the facts of a labor dispute." A candid and forthright appraisal of the picketing activities in question classifies them as a form of forcible technique that has been held to be subject to restrictive regulation by the State in the public interest on any reasonable basis. *Carpenters Union v. Ritter's Cafe*, 315 U. S. 722. And in the exclusive federal field of protecting the interests of the public in interstate commerce against forcible obstruction to the free flow of such commerce, Congress has, we think, in Section 8(b), (4), (A), kept within the permissive restrictions on free speech and assembly that have been approved by the Supreme Court in comparable legislation. See *Thornhill v. Alabama*, 310 U. S. 88 at 105.

The observation of Mr. Justice Douglas in the concurring opinion in *Bakery Drivers Local v. Wohl*, *supra*, delineates the evils of "the secondary boycott" which has met disapproval by the Supreme Court in *Duplex Printing Press Co. v. Deering*, 254 U. S. 443. The learned Justice in the cited recent labor case aptly stated: [102]

"Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation."

We find that the provisions of the Labor Management Relations Act, 1947, here under attack are valid Congressional legislation and are not unconstitutional.

The respondents' motion to dismiss the petition for temporary injunction is denied in toto.

Accordingly, the attorneys for the Board will within two days from notice hereof serve and present a proposed temporary injunction against respondents in the terms of Section 8(b), (4), (A) of the Act and pursuant to Section 10(1) of the Act, without costs.

Dated February 3, 1948.

PAUL J. McCORMICK

United States District Judge

[Endorsed]: Filed Feb. 3, 1948. Edmund L. Smith, Clerk. [103]

[Minutes: Friday, February 6, 1948]

Present: The Honorable Paul J. McCormick, District Judge.

George H. O'Brien, Esq., one of the attorneys for the petitioner herein, having this day, pursuant to Rule 50 F. R. C. P., and in accordance with the directions of the court in its memorandum of ruling, etc., filed herein February 3, 1948, presented proposed findings of fact, conclusions of law and order, and inspection of such instrument indicates service of same upon Robert W. Gilbert, Esq., Allen L. Sapiro, Esq., and Clarence E. Todd, Esq., as of date February 5, 1948.

Now, Therefore, said proposed findings of fact, conclusions of law and order being this day lodged with the

clerk, pursuant to local rule 7(a) of this court, the judge withholds and postpones consideration and determination of appropriate findings of fact, conclusions of law and injunctive order herein, as specified in said local rule 7(a) and attorneys for the respective parties hereto will govern themselves accordingly. [104]

[Title of District Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER

This cause came on to be heard upon the verified petition of Howard F. LeBaron, Regional Director of the 21st Region of the National Labor Relations Board, on behalf of said Board, for a temporary injunction, pending final adjudication by the Board of the matters involved, and upon issuance of an order to show cause. The Court has fully considered the verified petition and the motion to dismiss the petition and affidavit of respondent Walter J. Turner, attached thereto. Upon the entire records, briefs, and arguments of counsel, the Court lists the following: [105]

FINDINGS OF FACT

First: Petitioner is Regional Director of the 21st Region of the National Labor Relations Board (herein called the Board).

Second: Respondent Printing Specialties and Paper Converters Union, Local 388, AFL (hereinafter called Local 388) is a labor organization having its principal office within this judicial court, and engaged in promoting and protecting the interests of its employee members within this judicial district.

Third: Respondent Walter J. Turner is and has been at all times herein material, an agent of Local 388 and is engaged in this judicial district in promoting or protecting the interests of employee members of respondent Local 388.

Fourth: On or about November 18, 1947, Sealright Pacific, Ltd. (hereinafter called Sealright), pursuant to the provisions of Section 10(b) of the National Labor Relations Act, as amended (June 23, 1947, Public Law 101, 80th Cong., 1st Sess., Chap. 120, herein called the Act), filed the Charge alleging that respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8(b), subsection (4)(A) of the Act and affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Fifth: Said Charge was thereafter duly referred to petitioner for investigation. Petitioner has investigated said Charge.

Sixth: There is reasonable cause to believe that:

- (a) Sealright Pacific Ltd. is a corporation organized under and existing by virtue of the laws of the State of California. Its principal office and place of business is located at 1577 Rio Vista Avenue, Los Angeles, California, where it is engaged in the manufacture, sale and distribution of paper food containers and milk bottle caps. In the course and conduct of its business, it purchases and causes to be transported to its Los Angeles plant from points outside the State of California, paper, steel, shipping cases, etc., all valued at an excess of \$1,000,000.00 annually. Its finished products comprising milk bottle caps, milk bottle

closures and food containers, are valued at an excess of \$1,000,000.00 annually and more than 50 per cent of such products are shipped outside the State of [106] California.

- (b) Los Angeles Seattle Motor Express, Inc. (hereinafter called L. A. Seattle), 1147 Staunton Avenue, Los Angeles, is a common carrier operating motor trucks between Los Angeles and points in the Pacific Northwest. It has carried Sealright's products for a number of years.
- (c) On November 13, 1947, respondent Walter J. Turner (vice-president) of Local 388, advised L. A. Seattle that if it continued to handle Sealright's products, L. A. Seattle would be picketed by Local 388.
- (d) On about November 14, 1947, representatives of Local 388 followed two trucks loaded with Sealright's products to the L. A. Seattle terminal where by forming a picket line around the two trucks containing the products of Sealright and telling the employees that the trucks contained "hot cargo" and not to "handle it," induced and encouraged the employees of L. A. Seattle, by orders, force, threats, or promises of benefits, not to transport or handle the goods of Sealright. After November 14, 1947, as a result of the above conduct of Local 388 the employees of L. A. Seattle refused to transport or handle the goods of Sealright. Local 388 engaged in the foregoing conduct to force or require L. A. Seattle to cease handling or transporting the products of Sealright.

- (e) West Coast Terminals Co. (hereinafter called West Coast), is a public wharfinger with its docks and wharves located on Pier A, Berths 2 and 3, Terminal Island, Long Beach (2), California. On or prior to November 17, 1947, West Coast received from Panama Pacific Lines Vessel S. S. Green Bay Victory, a consignment of rolls of paper destined for Sealright's Los Angeles plant.
- (f) On November 17, 1947, while employees of West Coast were engaged in loading the rolls of paper onto freight cars consigned to Sealright in Los Angeles, a group of pickets representing Local 388 appeared at the docks of West Coast and, by forming a picket line around the freight cars being loaded with the rolls of paper for Sealright, induced and encouraged the employees of West Coast, by orders, force, threats, or promises of benefits, not to handle or work on the paper consigned to Sealright. Since November 17, 1947, as a result of the [107] above conduct of Local 388 and the continued picketing by Local 388 of the docks of West Coast, the employees of West Coast have refused to handle or work on the goods consigned to Sealright. Local 388 engaged in the foregoing conduct in order to force or require West Coast to cease handling or transporting the products of Sealright.

Seventh: Unless restrained from engaging in the aforementioned acts and conduct, there is imminent likelihood that respondents will continue to engage in such acts and conduct.

Eighth: The acts and conduct of respondents above set forth, occurring in connection with the operation of Sealright, described above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states and tend to lead and have led to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

First: Sealright is engaged in commerce within the meaning of Section 2, subsections (6) and (7) of the Act.

Second: Respondent Printing Specialties and Paper Converters Union, Local 388, AFL, is a labor organization within the meaning of Section 2, subsection (5) of the Act.

Third: Respondent Walter J. Turner is and has been at all times herein, an agent of Local 388 within the meaning of Section 8(b) of the Act.

Fourth: This Court has jurisdiction of the proceedings and of respondents, and can grant injunctive relief under Section 10(1) of the Act.

Fifth: Said jurisdiction of the Court is not limited by the Norris-LaGuardia Act. (U. S. C., Supp. VII, Title 29, Sect. 101-15.)

Sixth: Section 8(b), subsection (4)(A) of the Act is not repugnant to, or in controversion of, the guarantee of freedom of speech, the guarantee of liberty, and the prohibition of involuntary servitude contained in the

First, Fifth, and Thirteenth Amendments, respectively, of the Constitution of the United States.

Seventh: There is reasonable cause to believe that respondents have engaged in unfair labor practices within the meaning of Section 8(b), subsec- [108] tion (4)(A) of the Act, obstructing commerce within the meaning of Section 2, subsections (6) and (7) of the Act.

Eighth: It is appropriate, just, and proper that, pending final adjudication by the Board of said matter, respondents and each of them, their agents, servants, employees, attorneys, and all persons acting in active concert or participation with them, be enjoined and restrained from the commission or continuance of the acts and conduct set forth in the Findings of Fact above, or like or related acts or conduct whose commission in the future is likely or may be fairly anticipated, from respondents' acts and conduct in the past.

It is, therefore, by this Court:

Ordered that Printing Specialties and Paper Converters Union, Local 388, AFL, and Walter J. Turner and each of them and their agents, servants, employees, and attorneys and all persons in active concert or participation with them be and hereby are restrained and enjoined, pending final adjudication by the Board of this matter, from:

Engaging in, or inducing or encouraging, the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment

to use, manufacture, process, transport, or otherwise handle or work on any goods articles, materials, or commodities, or to perform any services, where an object thereof is forcing or requiring any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of, or to cease doing business with, Sealright Pacific, Ltd.

It Is Further Ordered that respondents' Motion to Dismiss the Petition for a Temporary Injunction herein be and hereby is dismissed in toto.

Dated at Los Angeles, California, this 6th day of February, 1948.

United States District Judge

Presented by: George H. O'Brien, Attorney for Petitioner.

Approved as to form this 5th day of February, 1948.

-----, Attorneys for Respondents. [109]

[Affidavit of Service by Mail.]

[Endorsed]: Lodged Feb. 6, 1948. Edmund L. Smith, Clerk. [110]

[Title of District Court and Cause]

RESPONDENTS' MEMORANDUM IN OPPOSITION TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND PRELIMINARY INJUNCTION [111]

Come now Printing Specialties and Paper Converters Union, Local 388, AFL, and Walter J. Turner, respondents herein, and aver that petitioner's Proposed Findings of Fact, and Conclusions of Law And Proposed Order do not conform to Rule 65(d) of the Rules of Civil Procedure for the District Courts of the United States, which provides:

"Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

Respondents hereby object to the following paragraphs in said proposed Order:

I.

Respondents object to petitioner's description of the order as a "temporary injunction" (p. 1, line 26), and hereby request that one of the following be substituted for the same: "interlocutory injunction," "preliminary injunction" or "injunction." It is to be noted that the Rules of Civil Procedure do not refer to "temporary

injunctions,” and do discuss “injunctions” (Rule 65), “interlocutory injunctions” (Rule 52) and “preliminary injunctions” (Rule 65). Perhaps petitioner may have confused this order with a Temporary Restraining Order (Rule 65(b-e)), from which no appeal may be had.

II.

OBJECTIONS TO PETITIONER'S PROPOSED FINDINGS OF FACT

It is obvious from the proposed Order that petitioner has adopted almost in haec verba those allegations appearing in the Petition For An Injunction (pp. 2-5) as the “Findings of Fact” in the present Order. The defects in such proposed Findings of Fact, including the omission of any and all uncontroverted facts adduced by respondents become patent upon comparison of said proposed [112] Findings with the facts as conceded in petitioner's Memorandum of Points and Authorities In Support Of Petition For Injunction (pp. 9-10) and the Affidavit of Walter J. Turner In Support Of Motion To Dismiss (pp. 1-6).

The Sixth Finding of Fact encompasses the basic facts in the labor dispute in question. Since the order granting the preliminary injunction is based upon conduct flowing from this dispute, respondents contend that the statement must show accurately all facts relating thereto presented by both parties, and must not contain legal conclusions. This Honorable Court has pointed out the variance between the factual conclusions of the Regional Director of the Board and those uncontroverted facts attested in the affidavit of Mr. Turner (Mem. Op. p. 5, lines 3-7), and thus it can be seen that the facts presented by both sides must be so included.

1. Sub-paragraphs (a) and (b) of the Sixth Finding of Fact are exact copies of the allegations set forth in Section 7 of the Petition For An Injunction (p. 3, parags. (a) and (b)).

2. Sub-paragraph (c) of the Sixth Finding is likewise an exact duplication of Section 7(c) of the Petition For An Injunction. This sub-paragraph illustrates the inaccuracies which occur from what might be termed a "short-cut" method of using the statements in the petitioner's initial pleading, rather than trying to present a comprehensive statement of fact which is not based solely on the complaint.

In this subsection, Walter J. Turner is described as the "vice-president" of Local 388, which follows a similar description set forth in the original petition (p. 3, Section 7(c)). In his subsequent affidavit, Mr. Turner alleged that he is and was the secretary-treasurer of the union. That this is the true office held by Mr. Turner is best evidenced by the statement in petitioner's Memorandum of Points and Authorities In Support Of Petition For Injunction, wherein it is correctly alleged that Mr. Turner was the secretary-treasurer of Local 388 (Memo. of Pts. & Auths., p. 9, line 19).

However a more serious error is found in petitioner's erroneous allegation that Turner "advised L. A.-Seattle that if it continued to handle Sealright's products, L. A. Seattle would be picketed by Local 388." [113]

This allegation is specifically refuted by the Affidavit of Walter Turner (p. 4, etc.), wherein it is alleged that "At no time did affiant advise Los Angeles-Seattle Motor Express, Inc. that Local 388 would picket all or any of the firm's operations as such, if it continued to handle Sealright products, nor did affiant in any way indicate

or imply that Local 388 would picket any other products being handled or transported by said firm for companies other than Sealright Pacific, Ltd., under any circumstances whatsoever." In addition, petitioner himself, in his Memorandum of Points and Authorities of January 2, 1948 (at p. 9) refutes his statement of December 17, 1947, made in the Petition for Injunction, for in the January 2, 1948, pleading, it is stated that "On about November 13, 1947, respondent Turner, Secretary-Treasurer of Local 388, advised the Los Angeles Seattle Motor Express, Inc. (hereinafter called L. A. Seattle), a common carrier which has transported Sealright's products, that if L. A. Seattle continued to handle Sealright's products, Local 388 would picket Sealright products handled by L. A. Seattle."

There can be no doubt that this quotation is in sharp conflict with the petitioner's proposed Sixth (c) Finding of Fact.

3. Sub-paragraph (d) of the Sixth Finding of Fact, being a duplicate of Section 7(a) of the Petition, attempts to incorporate conclusions of law into the facts. A more factual description of the identical incident appears on Page 9 of petitioner's Memorandum of Points And Authorities In Support Of Petition For Injunction, wherein it is stated that . . . "On about November 14, 1947, representatives of Local 388 formed as a picket line around two trucks loaded with Sealright's products at the terminal of L. A. Seattle. Said representatives informed the employees of L. A. Seattle that the trucks contained hot cargo and told or requested them not to handle it. After November 14, as a result of said picketing by Local 388, the employees of L. A. Seattle refused to transport or handle the goods of Sealright."

The foregoing statement of the petitioner incorporates far less legal conclusions than does the proposed Sub-paragraph (d), which seeks to use legal phrases rather than factual descriptions.

4. Sub-paragraph (e) of the Sixth Finding is a duplication of Paragraph [114] 7(e) of the Petition, with the words "(hereinafter called West Coast)" added.

5. Sub-paragraph (f) similarly is exactly the same as Paragraph 7(f) of the Petition (Petition, pp. 4-5), and in the same pattern as the aforementioned sub-paragraphs, seeks to incorporate the charges made on December 17, 1947, as the findings of fact. In the Memorandum of Points and Authorities In Support Of The Petition, the petitioner makes a more factual and less-legalistic description of the incident which sub-paragraph (f) attempts to describe. (See Memo. of Pts. and Auths. p. 9, lines 29-32.)

A more important error in this sub-paragraph is the omission from the findings of fact that on or about November 17, 1947, Local 388 peacefully picketed Sealright products being loaded onto three freight cars located at a siding adjacent to the warehouse of the West Coast Terminals Company, which products consisted of rolls of paper consigned from a New York plant of Sealright Pacific Ltd. to the Los Angeles branch plant of the struck concern for use in continued manufacturing operations. (See Respondents' Supplementary Memo. of Pts. and Auths. p. 3, parag. (4); Affidavit of Walter J. Turner, p. 5, lines 20-23.)

6. Respondents request this Honorable Court to strike Paragraphs Seventh and Eighth of the Findings of Fact on the grounds that no evidence or factual matter what-

soever was presented by petitioner in support of either of these paragraphs, and therefore the same are merely petitioner's conclusions. (See Petition for Injunction, p. 5, parag. 8.)

Additional Findings of Fact

As discussed above, the uncontroverted facts presented by both parties which are pertinent to the case herein, should be included in the Findings of Fact. To accomplish this, respondents have prepared the Proposed Findings of Fact which is attached to this Memorandum, marked as "Exhibit A" and incorporated by reference herein.

In summary, respondents make the above objections to the Proposed Findings of Fact because the Petition for Injunction is not in reality a verified petition in that no proof was offered in any manner whatsoever that the facts and incidents alleged by the petitioner did occur. The only verification present is that of [115] the regional director that he had reason to believe that certain acts occurred, but proof of the facts upon which such reason is based has not been offered by petitioner. No witnesses and no affidavits were presented by petitioner, and therefore it is improper to make any finding of fact where such has not been admitted or conceded by respondents.

III.

OBJECTIONS TO PETITIONER'S PROPOSED CONCLUSIONS OF LAW

1. Respondents object to the language of the Fourth Conclusion of Law. This Honorable Court has jurisdiction of the proceedings and of respondents, and pursuant

to the provisions of Section 10(1) of the Act, may grant such injunctive relief as it deems just and proper.

2. Respondents object to the Fifth Conclusion of Law as being surplusage and having no part in the case herein, and therefore request this Honorable Court to strike the same from the Proposed Conclusions of Law.

3. Respondents object to the Seventh Conclusion of Law as misstating the evidence submitted in the case herein. As stated in, and according to, the affidavits and pleadings on file in this case, the petitioner claims reasonable cause to believe that respondents have engaged in unfair labor practices within the meaning of Section 8(b), subsection (4)(A) of the Act.

4. Respondents object to the Eighth Conclusion of Law in that petitioners violate Rule 65(d) of the Rules of Civil Procedure, set forth hereinabove, in that the application of the injunction is not limited to the respondents, their officers, agents, servants, employees and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

IV.

OBJECTIONS TO PETITIONER'S PROPOSED INJUNCTION ORDER

Respondents object to petitioner's couching the proposed Order in the language of the Act, which language is so vague and indefinite that it will be impossible for petitioner and respondents to know what conduct is allowed and what conduct is limited by the Order. It is the intention of the respondents to comply with the Order of this Honorable Court pending the taking of an appeal

[116] therefrom. However respondents cannot ascertain from the proposed Order whether they would be restrained from picketing Sealright Pacific, Ltd., Los Angeles-Seattle Motor Express, Inc., or West Coast Terminals Co., or any employer; from causing Sealright Pacific, Ltd., to be placed on the "We Do Not Patronize" list of the Los Angeles Central Labor Council and of said list of the California State Federation of Labor; whether respondents are prohibited thereby from publicizing the facts of the labor dispute in issue by expressing any views, arguments or opinions, or disseminating the same in written, printed, graphic or visual form.

Finally respondents object to said proposed Order on the ground that it fails to comply with the requirement of Rule 65 (d) of the Rules of Civil Procedure, set forth hereinabove, in that it is not specific in terms; does not describe in reasonable detail the act or acts sought to be restrained; and violates Rules 65(d) in that it is not limited to the parties herein, their officers, agents, servants, employees and attorneys, and those persons in active concert or participation who receive actual notice of the order by personal service or otherwise.

Respectfully submitted,

ROBERT W. GILBERT

CLARENCE E. TODD

ALLAN L. SAPIRO

Attorneys for Respondent Printing Specialties and
Paper Converters Union, Local #388

By Allan L. Sapiro [117]

EXHIBIT "A"

PROPOSED FINDINGS OF FACT

First, Petitioner is Regional Director of the 21st Region of the National Labor Relations Board (herein referred to as the Board).

Second, Respondent Printing Specialties and Paper Converters Union, Local 388, AFL (hereinafter referred to as Local 388) is a labor organization having its principal offices at 1543 West 11th Street, Los Angeles, California, within this judicial district and is engaged in promoting and protecting the interests of its employee members within this judicial district.

Third, Respondent Walter J. Turner is and has been at all times herein mentioned, an officer of Local 388, to wit, the secretary-treasurer, and is engaged in this judicial district in promoting and protecting the interests of employee members of respondent Local 388.

Fourth, On or about November 18, 1947, Sealright Pacific Ltd. (hereinafter called Sealright) pursuant to the provisions of Section 10(b) of the National Labor Relations Act, as amended June 23, 1947, Public Law 101, 80th Cong., 1st Sess., Chap. 120, herein called the Act), filed the Charge alleging that respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8(b), subsection (4)(A) of the Act and affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Fifth, Said Charge was thereafter duly referred to petitioner for investigation. Petitioner has investigated said Charge.

Sixth, Local 388 is a party to numerous collective bargaining agreements consummated with various employers

engaged in the manufacture, distribution and sale of various boxes and paper products in addition to food containers and milk bottle caps. By the terms of said agreements, contracted during the past twelve months, 1,500 members of the union are assured of a prevailing scale of minimum wages ranging from \$1.20 to \$1.33½ per hour for the lowest-skilled male job classifications and from \$1.10 to \$1.22½ per hour for the lowest-skilled female job classifications, with progressively higher rates for skilled job classifications set forth in said contracts. [118]

Seventh, Sealright Pacific Ltd. is a corporation organized under and existing by virtue of the laws of the State of California. Its principal office and place of business is located at 1577 Rio Vista Avenue, Los Angeles, California, where it is engaged in the manufacture, sale and distribution of paper food containers and milk bottle caps. In the course and conduct of its business, it purchases and causes to be transported to its Los Angeles plant from points outside the State of California, paper, steel, shipping cases, etc., all valued at an excess of \$1,000,000.00 annually. Its finished products comprising milk bottle caps, milk bottle closures and food containers, are valued at an excess of \$1,000,000.00 annually and more than 50 per cent of such products are shipped outside the State of California.

Eighth, Local 388 was recognized as the exclusive bargaining agent of the production employees of the Los Angeles plant of Sealright Pacific, Ltd. in September, 1941, by said corporation. Each year thereafter, from 1941 to 1946, collective bargaining agreements were negotiated and executed between Sealright Pacific, Ltd. and Local 388 through negotiations, and without any strike or interruption of work.

Ninth, On August 16, 1947, Local 388 gave notice to Sealright Pacific, Ltd. pursuant to provisions in the union contract, of proposed modifications in the agreement, which terminated October 16, 1947. On September 15, 1947, in compliance with Section 8(d)(3) of the National Labor Relations Act as amended on June 23, 1947, Local 388 notified the Federal Mediation and Conciliation Service and the California State Department of Industrial Relations that a dispute existed. Thereafter between August 16, 1947, and October 29, 1947, eleven (11) meetings were held between representatives of Local 388 and of Sealright Pacific, Ltd. for the purpose of negotiating a new contract, during the course of which meetings mutual consent was arrived at between the two parties as to all terms of a new collective bargaining agreement, except wage rates and holiday pay. At the final meeting on October 29, 1947, Sealright Pacific, Ltd. offered to raise the hourly rate for the lowest-skilled male job classification from \$1.02½ to \$1.10, whereas the prevailing industry male base rate ranged from \$1.20 to \$1.33½ per hour. The company also offered to raise [119] the hourly rates for the lowest-skilled female job classification from \$.87½ to \$.92½ per hour, although the industry rate ranged from \$1.10 to \$1.22 per hour.

Tenth, Local 388 was unwilling to accept the wage offers proposed by Sealright Pacific, Ltd. on October 29, 1947, because of standards contained in the various existing contracts between Local 388 and the other employers of the 1,500 members of the local union, and therefore called a strike of its members against Sealright Pacific, Ltd., on November 3, 1947.

Eleventh, At the time said strike was instituted, all of the seventy (70) production employees of the Los

Angeles plant of Sealright Pacific, Ltd. were members in good standing of Local 388, and all but three of said employees joined in said strike against their employer.

Twelfth, Los Angeles-Seattle Motor Express, Inc. (hereinafter referred to as L. A.-Seattle), at 1147 Staunton Avenue, Los Angeles, California, is a common carrier operating motor trucks between Los Angeles and points in the Pacific Northwest. It *was* carried Sealright's products for a number of years.

Thirteenth, On or about November 13, 1947, respondent Walter J. Turner, Secretary-Treasurer of Local 388, advised the L. A.-Seattle Motor Express Inc. that Local 388 was engaged in a strike due to a wage dispute with Sealright Pacific, Ltd., and that Local 388 intended to picket Sealright's products manufactured under strike conditions and at substandard wages for the purpose of publicizing the dispute and soliciting the assistance of other workers asking that they decline to handle this merchandise.

Fourteenth, On or about November 14, 1947, members of Local 388 on strike at Sealright Pacific, Ltd., formed a peaceful picket line around two trucks loaded with Sealright's products at the terminal of L. A.-Seattle, and informed the trucking concern's employees that the Sealright Pacific, Ltd. products were manufactured under strike conditions and for substandard wages, and requested them not to handle said products. After November 14, 1947, the employees of L. A.-Seattle refused to transport or handle the goods of Sealright Pacific, Ltd.

Fifteenth, West Coast Terminals Co. (hereinafter referred to as West Coast), is a public wharfinger with its docks and wharves located on Pier A, [120] Berths 2

and 3, Terminal Island, Long Beach, California. On or prior to November 17, 1947, West Coast received from the Panama Pacific Lines' vessel, S. S. Green Bay Victory, a consignment of rolls of paper from a New York plant of Sealright Pacific, Ltd., destined for the Los Angeles plant of Sealright.

Sixteenth, On November 17, 1947, and for several days thereafter, members of Local 388 picketed Sealright Pacific, Ltd. products being loaded onto three freight cars by employees of West Coast Terminals Co., which products were rolls of paper consigned from the New York plant to the Los Angeles plant of Sealright Pacific, Ltd., for use in manufacturing operations. The three freight cars in question were located on a siding alongside a West Coast warehouse, and the picket lines established by Local 388 did not pass in front of the doors of the warehouse. Whenever it was necessary for the West Coast to move these three freight cars in order to bring on or remove other freight cars from the siding, the members of Local 388 did not interfere with said moving. Subsequent to November 17, 1947, the employees of West Coast have refused to handle or work on goods consigned to Sealright Pacific, Ltd. [121]

[Affidavit of Service by Mail.]

[Endorsed]: Filed. Feb. 10, 1948. Edmund L. Smith, Clerk. [122]

[Minutes: Wednesday, February 11, 1948]

Present: The Honorable Paul J. McCormick, District Judge.

Petitioner having submitted pursuant to memorandum of ruling, proposed findings of fact, conclusions of law

and order, and respondents having filed memorandum in opposition thereto, the Court fixes and sets for hearing, settlement and entry of findings of fact, conclusions of law and injunctive relief in this action, Friday, February 13th, 1948, at 2:00 P. M. of said day, and the Clerk will notify respective attorneys accordingly. [123]

[Minutes: Friday, February 13, 1948]

Present: The Honorable Paul J. McCormick, District Judge.

For hearing, settlement and entry of Findings of Fact and Conclusions of Law, and Injunctive Relief in this action, pursuant to order entered Feb. 11, 1948; Geo. H. O'Brien, Esq., appearing as counsel for petitioner; Robert W. Gilbert and Allan L. Sapiro, Esqs., appearing as counsel for respondents; and both sides answering ready, it is ordered that counsel proceed.

Attorney Gilbert makes a statement; Attorney O'Brien makes a statement; Attorney Gilbert makes a further statement; the Court makes a statement; and counsel makes further statements re proposed amendments to documents before the Court. The Court orders that proposed Findings of Fact, Conclusions of Law and injunctive relief issue as requested and as amended at this hearing to show (1) incorporation of the Court's ruling by reference in Findings of Fact, and (2) addition to final page of proposed injunction, certain words defining acts prohibited. Attorney for petitioner is directed to prepare, serve, and present to the Court said documents in final form by Feb. 16, 1948, 4 P. M. [124]

In the District Court of the United States for the
Southern District of California

Central Division

No. 7859-M.

HOWARD F. LeBARON, Regional Director of the 21st
Region of the NATIONAL LABOR RELATIONS
BOARD, on Behalf of the NATIONAL LABOR
RELATIONS BOARD,

Petitioner,

v.

PRINTING SPECIALTIES AND PAPER CON-
VERTERS UNION, LOCAL 388, AFL, and
WALTER J. TURNER,

Respondents.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER

This cause came on to be heard upon the verified petition of Howard F. LeBaron, Regional Director of the 21st Region of the National Labor Relations Board, on behalf of said Board, for a temporary injunction, pending final adjudication by the Board of the matters involved, and upon issuance of an order to show cause. The Court has fully considered the verified petition and the motion to dismiss the petition and affidavit of respondent Walter J. Turner, attached thereto. Upon the entire record, briefs, and arguments of counsel, the Court lists the following: [125]

FINDINGS OF FACT

First: Petitioner is Regional Director of the 21st Region of the National Labor Relations Board (herein called the Board).

Second: Respondent Printing Specialties and Paper Converters Union, Local 388, AFL (hereinafter called Local 388) is a labor organization having its principal office within this judicial district and engaged in promoting and protecting the interests of its employee members within this judicial district.

Third: Respondent Walter J. Turner is and has been at all times herein material, an agent of Local 388 and is engaged in this judicial district in promoting or protecting the interests of employee members of respondent Local 388.

Fourth: On or about November 18, 1947, Sealright Pacific, Ltd. (hereinafter called Sealright) pursuant to the provisions of Section 10(b) of the National Labor Relations Act, as amended (June 23, 1947, Public Law 101, 80th Cong., 1st Sess., Chap. 120, herein called the Act), filed the Charge alleging that respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8(b), subsection (4)(A) of the Act and affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Fifth: Said Charge was thereafter duly referred to petitioner for investigation. Petitioner has investigated said Charge.

Sixth: There is reasonable cause to believe that:

- (a) Sealright Pacific Ltd. is a corporation organized under and existing by virtue of the laws of the State of California. Its principal office and place of business is located at 1577 Rio Vista Avenue, Los Angeles, California, where it is engaged in the manufacture, sale and distribution of paper food containers and milk bottle caps. In the course

and conduct of its business, it purchases and causes to be transported to its Los Angeles plant from points outside the State of California, paper, steel, shipping cases, etc., all valued at an excess of \$1,000,000.00 annually. Its finished products comprising milk bottle caps, milk bottle closures and food containers, are valued at an excess of \$1,000,000.00 annually and more than 50 per cent of such products are shipped outside the State of [126] California.

- (b) Los Angeles Seattle Motor Express, Inc., (hereinafter called L. A. Seattle), 1147 Staunton Avenue, Los Angeles, is a common carrier operating motor trucks between Los Angeles and points in the Pacific Northwest. It has carried Sealright's products for a number of years.
- (c) On November 13, 1947, respondent Walter J. Turner (vice-president) of Local 388, advised L. A. Seattle that if it continued to handle Sealright's products, L. A. Seattle would be picketed by Local 388.
- (d) On about November 14, 1947, representatives of Local 388 followed two trucks loaded with Sealright's products to the L. A. Seattle terminal where by forming a picket line around the two trucks containing the products of Sealright and telling the employees that the trucks contained "hot cargo" and not to "handle it," induced and encouraged the employees of L. A. Seattle, by orders, force, threats, or promises of benefits, not to transport or handle the goods of Sealright. After November 14, 1947, as a result of the above conduct of Local 388 the employees of L. A.

Seattle refused to transport or handle the goods of Sealright. Local 388 engaged in the foregoing conduct to force or require L. A. Seattle to cease handling or transporting the products of Sealright.

- (e) West Coast Terminals Co., (hereinafter called West Coast) is a public wharfinger with its docks and wharves located on Pier A, Berths 2 and 3, Terminal Island, Long Beach (2), California. On or prior to November 17, 1947, West Coast received from Panama Pacific Lines Vessel S.S. Green Bay Victory, a consignment of rolls of paper destined for Sealright's Los Angeles plant.
- (f) On November 17, 1947, while employees of West Coast were engaged in loading the rolls of paper onto freight cars consigned to Sealright in Los Angeles, a group of pickets representing Local 388 appeared at the docks of West Coast and, by forming a picket line around the freight cars being loaded with the rolls of paper for Sealright, induced and encouraged the employees of West Coast, by orders, force, threats, or promises of benefits, not to handle or work on the paper consigned to Sealright. Since November 17, 1947, as a result of the [127] above conduct of Local 388 and the continued picketing by Local 388 of the docks of West Coast, the employees of West Coast have refused to handle or work on the goods consigned to Sealright. Local 388 engaged in the foregoing conduct in order to force or require West Coast to cease handling or transporting the products of Sealright.

Seventh: Unless restrained from engaging in the aforementioned acts and conduct, there is imminent likeli-

hood that respondents will continue to engage in such acts and conduct.

Eighth: The acts and conduct of respondents above set forth, occurring in connection with the operation of Sealright, described above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states and tend to lead and have led to labor disputes burdening and obstructing commerce and the free flow of commerce.

Ninth: This Court's February 3, 1948, Memorandum of Ruling and Order Granting Injunction Under Section 10(1) of the National Labor Relations Act as amended is hereby reaffirmed and made a part hereof with the same force and effect as though fully set forth herein.

CONCLUSIONS OF LAW

First: Sealright is engaged in commerce within the meaning of Section 2, subsection (6) and (7) of the Act.

Second: Respondent Printing Specialties and Paper Converters Union, Local 388, AFL, is a labor organization within the meaning of Section 2, subsection (5) of the Act.

Third: Respondent Walter J. Turner is and has been at all times herein, an agent of Local 388 within the meaning of Section 8(b) of the Act.

Fourth: This Court has jurisdiction of the proceedings and of respondents, and can grant injunctive relief under Section 10(1) of the Act.

Fifth: Said jurisdiction of the Court is not limited by the Norris-LaGuardia Act. (U. S. C., Supp. VII, Title 29, Sect. 101-15.)

Sixth: Section 8(b), subsection (4)(A) of the Act is not repugnant to, or in controversion of, the guarantee

of freedom of speech, the guarantee of liberty, and the prohibition of involuntary servitude contained in the First, [128] Fifth, and Thirteenth Amendment, respectively, of the Constitution of the United States.

Seventh: There is reasonable cause to believe that respondents have engaged in unfair labor practices within the meaning of Section 8(b), subsection (4)(A) of the Act, obstructing commerce within the meaning of Section 2, subsections (6) and (7) of the Act.

Eighth: It is appropriate, just, and proper that, pending final adjudication by the Board of said matter, respondents and each of them, their agents, servants, employees, attorneys, and all persons acting in active concert or participation with them, be enjoined and restrained from the commission or continuance of the acts and conduct set forth in the Findings of Fact above, or like or related acts or conduct whose commission in the future is likely or may be fairly anticipated, from respondents' acts and conduct in the past.

It is, therefore, by this Court:

Ordered that Printing Specialties and Paper Converters Union, Local 388, AFL, and Walter J. Turner and each of them and their agents, servants, employees and attorneys and all persons in active concert or participation with them be and hereby are restrained and enjoined, pending final adjudication by the Board of this matter, from:

Engaging in, or inducing or encouraging, the employees of any employer, by picketing, orders, force, threats, or promises of benefit, ~~or by permitting any such to remain in effect, [PJM, J]~~ or by any other like or related acts or conduct to engage in, a strike

or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, where an object thereof is forcing or requiring any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of, or to cease doing business with, Seal-right Pacific, Ltd.

It Is Further Ordered that respondents' Motion to Dismiss the Petition for a Temporary Injunction herein be and hereby is dismissed in toto. [129]

Dated at Los Angeles, California, this 16th day of February, 1948, at 4:12 p. m.

PAUL J. McCORMICK

United States District Judge

Presented by: George H. O'Brien, Attorney for Petitioner.

Approved as to form this 16th day of February, 1948.
....., Attorneys for Respondents.

Judgment entered Feb. 16, 1948. Docketed Feb. 16, 1948. Book 48, page 551. Edmund L. Smith, Clerk; by E. M. Enstrom, Jr., Deputy. [130]

Received copy of the within Findings of Fact, etc., this 16th day of February, 1948. Marian A. Hauger for Robert W. Gilbert, Allan L. Sapiro.

[Endorsed]: Filed Feb. 16, 1948. Edmund L. Smith, Clerk. [121]

United States District Court
Southern District of California

Central Division

NOTICE BY CLERK OF ENTRY OF JUDGMENT

George H. O'Brien, Esq., et al.
National Labor Relations Board
111 W. 7th St., Rm. 704
Los Angeles 14, Calif.

Robert W. Gilbert, Esq., et al.
117 W. Ninth St.
Los Angeles 15, Calif.

Re: Howard F. LeBaron v. Printing Specialties
Union, et al., No. 7859-M-Civ.

Gentlemen:

You are hereby notified that Order for Injunctive Relief has been entered this day in the above-entitled case, in Civil Order Book, No. 48, page 551.

Feb. 16, 1948

EDMUND L. SMITH

Clerk

By E. M. Enstrom

Deputy Clerk [132]

[Title of District Court and Cause]

NOTICE OF APPEAL TO CIRCUIT COURT OF
APPEALS [133]

Notice is hereby given that Printing Specialties and Paper Converters Union, Local 388, AFL, and Walter J. Turner, respondents above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the order and temporary injunction enjoining and restraining the respondents Printing Specialties and Paper Converters Union, Local 388, AFL, and Walter J. Turner and each of them and their agents, servants, employees and attorneys and all persons in active concert or participation with them pending final adjudication by the Board of this matter, from:

Engaging in, or inducing or encouraging, the employees of any employer, by picketing, orders, force, threats, or promises of benefit, or by any other like or related acts or conduct to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, where an object thereof is forcing or requiring any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of, or to cease doing business with, Sealright Pacific, Ltd.,

entered in this action on February 16, 1948.

Dated: March 1, 1948.

ROBERT W. GILBERT

CLARENCE E. TODD

ALLAN L. SAPIRO

Attorneys for Appellants

By Allan L. Sapiro

[Endorsed]: Filed & mld. copy to Geo. H. O'Brien,
Mar. 1, 1948. Edmund L. Smith, Clerk. [134]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 138, inclusive, contain full, true and correct copies of Petition for an Injunction Under Section 10(1) of the National Labor Relations Act, as amended; Motion for Order to Show Cause; Order to Show Cause; Notice of Motion to Dismiss Petition for an Injunction Under Section 10(1) of the National Labor Relations Act, as amended together with Respondents' Memorandum of Points and Authorities and Affidavit of Walter J. Turner in Support of Motion to Dismiss; Exhibit 1 to Petition for Injunction; Memorandum of Points and Authorities in Support of Petition for Injunction Under Section 10(1) of the National Labor Relations Act, as

amended; Respondents' Supplementary Memorandum of Points and Authorities; Motion for Leave to File Supplement to Petitioner's Memorandum of Points and Authorities; Order; Supplement to Petitioner's Memorandum of Points and Authorities; Reply to Petitioner's Supplementary memorandum of Points and Authorities; Memorandum of Ruling and Order Granting Injunction Under Section 10(1) of the National Labor Relations Act as amended; Minute Order Entered February 6, 1948; Findings of Fact and Conclusions of Law and Order (Proposed); Respondents' Memorandum in Opposition to Proposed Findings of Fact and Conclusions of Law and Preliminary Injunction; Minute Orders Entered February 11 and 13, 1948; Findings of Fact and Conclusions of Law and Order; Copy of Notice by Clerk of Entry of Judgment; Notice of Appeal to Circuit Court of Appeals and Designation of Contents of Record on Appeal which, together with copy of Reporter's Transcript of Proceedings on December 18 and 30, 1947 and February 13, 1948, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$35.45 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 8th day of April, A. D. 1948.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy

[Title of District Court and Cause]

Honorable Paul J. McCormick, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, December 18, 1947

Appearances:

For the Petitioner: George H. O'Brien, Esq.

For the Respondents: Robert W. Gilbert, Esq., Clarence E. Todd, Esq. [1*]

Los Angeles, California, Thursday, December 18, 1947.

1:30 P. M.

The Clerk: No. 7859-M, Civil. Howard F. LeBaron, Regional Director of 21st Region of National Labor Relations Board v. Printing Specialties and Paper Converters Union, et al., for hearing petition for order to show cause.

The Court: Proceed, Mr. O'Brien.

Mr. O'Brien: This is definitely an extraordinary proceeding, both for me and for the court. It is a new jurisdiction conferred upon this court by Section 10(1) of the Labor-Management Relations Act of 1947.

My motion this morning, if it please the court, is for entry of an order to show cause, if any there be, why the respondents named in the petition filed here yesterday should not answer and reply. In substance, that is my motion.

I am not prepared to argue the merits of the case at this time, although if necessary I can do so. I do

*Page number appearing at top of page of original Reporter's Transcript.

suggest that the court require the respondents Printing Specialties and Paper Converters Union, Local 388, A.F.L., and Walter J. Turner, who are here today represented by counsel, to appear and answer this complaint on a day certain to be set by the court.

The Court: Counsel appear to be here. Is there any objection to the motion, gentlemen?

Mr. Todd: If your Honor please— [2]

The Court: Gentlemen, if you will state your appearances, please. We have a new clerk, and I think he is not familiar with the counsel.

Mr. Todd: I am Clarence E. Todd, and I appear with Mr. Robert W. Gilbert. We two represent the respondent to be if this order is made.

Our contention, if your Honor please, is that the portion of the Labor-Management Relations Act, commonly known as the Taft-Hartley Act, which is invoked here, is wholly unconstitutional, and our appearance will be special for the purpose of making that contention, and that contention will be adhered to throughout any proceedings that may be had.

Our objection to this preliminary procedure is that it is an idle act on the part of the court to receive the petition and to issue the order to show cause. We are quite ready to argue the merits, also, but, of course, this is not the place or the time for that to be done; but we question the jurisdiction of the court and we contend that we have ruling authorities to the effect that this portion of the Act is wholly unconstitutional and no judgment could be issued by this or any other court in enforcement of the portion of the Act which is invoked.

The Court: The section cited by counsel, as far as it is material, reads thus:

Section 10, isn't it? [3]

Mr. O'Brien: 10(1), sir.

The Court: Under the title "Prevention of unfair labor practices," Section 10(a):

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise; Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

Subsection (1) of the Act provides thus:

"Whenever it is charged that any person has [4] engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8(b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred.

If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: Provided further, That no temporary restraining order shall be issued [5] without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: Provided further, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly

authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D)." [6]

The court has before it a copy of the petition filed in this court December 17, 1947, and unless it is desired I shall not read it into the record, gentlemen. I have read it in chambers, and it seems to recite for the purposes of this proceeding, and not otherwise, sufficient cause to justify the issuance of an order to show cause.

Mr. Todd: Would your Honor hear me for just a moment?

The Court: Yes.

Mr. Todd: Would your Honor set down the motion for argument? That might save a good deal of time of the court.

The Court: I thought I would specify the return day, and then on that day we will hear such argument as you desire to present, and such other methods of approach. In other words, I see no difference between the ordinary processes in a suit in equity under the rules, except as modified by the procedure adopted in this Act, and this case.

Mr. Todd: Except that—I don't mean to interrupt your Honor.

The Court: Go ahead.

Mr. Todd: Since we raise the objection of lack of jurisdiction in limine, it might be appropriate—your

Honor might make some other order—it might be appropriate just to set the petition for the order to show cause for hearing. The petition sets out the facts on which it is based. If those facts are true, and the law is constitutional, certainly [7] you have a right to issue the order. If those facts are true and the law is unconstitutional, the facts certainly do not confer jurisdiction on the court.

The Court: That is the thought I had in mind. For a court to act, there must be a vehicle which brings the suitors before the court.

I appreciate the good offices of counsel for the respondents in coming here. They were not required to come, and it is appreciated that they have come. But, after all, in a matter of this importance the procedural steps should be very carefully taken, and one of the procedural steps necessary in an action in the courts is the issuances of a vehicle to bring the parties before the court for consideration, and I presume that in this case is the order to show cause.

When did you want it returnable, Mr. O'Brien, or gentlemen, if you can agree upon a date?

Mr. O'Brien: I suggested to Mr. Gilbert, after talking with Mr. Winthrop A. Johns who will argue the case before this court, December 30th. Of course, subject to the convenience of this court.

The Court: What is your attitude, gentlemen?

Mr. Gilbert: If that is convenient to the court, your Honor, that will be satisfactory to us.

The Court: I have a matter set on the 29th at 2:00 o'clock that may possibly run over into the next day. [8]

Mr. Todd: We would like as early a date as convenient to the court. If your Honor could give us one or two days after that, that would be all right with us.

The Court: How long do you think it will take to present the matter?

Mr. Todd: If your Honor please, it takes a little time to go into these constitutional matters. I believe that the constitutional points involved will be the same as in the recent hot cargo cases before the courts of California, and where we have had a day for argument it hasn't been too long.

The Court: I think you are entitled to that time. What is your estimate, Mr. O'Brien?

Mr. O'Brien: May it please the court, I regard the word "shall" in Section 10(1) as being mandatory. As fast as possible. I have talked with Mr. Winthrop Johns in Washington, who will argue this case before the court, and he says the earliest date that he can be out here is December 30th, and any date after that he will be available.

The Court: It would suit our calendar a little better to have it the week following New Year's Day, I think.

That matter that was on today, was that continued until January 6th, Mr. Clerk, that tax matter?

The Clerk: It was continued to January 8th, your Honor, at 2:00 o'clock. [9]

The Court: I think perhaps we might just as well set it for the 30th, as later. The order to show cause will issue and be made returnable on December 30th at 10:00 o'clock, the morning of that day, and we will allow

that entire day, and, if necessary, over into the next day for argument.

I would like to have the memoranda under the rules, gentlemen. I presume you are all familiar with our rules, although I am not sure that you are all familiar with the rules. We have a rule here that requires the submission of memoranda before the hearing of these motions, and if you will consult that and comply with it so that the court will have your memoranda a few days before the argument, it will facilitate the hearing of the return.

Do you have your order to show cause in form, Mr. O'Brien?

Mr. O'Brien: Yes, sir, and I have submitted copies to counsel.

In the order to show cause, if it please the court, it requires three things: one, the date of return, which has already been settled; two, a date for answer, which has not been discussed, and I am perfectly willing to waive that; and, three, requiring service by the United States Marshal, which again might be changed on the form of the order.

The Court: You say you are waiving the provisions on [10] lines 16 to 22 on page 2 of the proposed order, Mr. O'Brien?

Mr. O'Brien: I think that would be proper, sir.

The Court: That will be stricken, then.

Order to show cause, issued, returnable on the 30th of December at 10:00 o'clock.

Mr. Gilbert: May it please the court, just before this matter is completely disposed of, I wonder if it would be permissible to inquire whether any affidavits which

the Board might submit in support of its petition will be served with the order to show cause? I don't believe that the latter part of the order to show cause specifies so, but I just wanted to ask as a matter of information what procedure would be followed.

The Court: Are there any affidavits to be filed in addition to the petition, Mr. O'Brien?

Mr. O'Brien: No, may it please the court. In re-checking these documents I found two defect in the petition itself. The first one, on page 2, line 9, a temporary restraining order is not requested. I think that is clear from this proceeding now. The words "temporary restraining order" should be deleted. But, again, I do not consider that material.

On page 2, line 32, a copy of the charge is not attached, and as to that I am very sorry, it is due entirely to my own negligence that it was not attached. However, we do have [11] parties here who have received copies of the original charge.

Mr. Gilbert: That is correct.

The Court: That portion is waived without any waiver of the constitutional objection.

Mr. Gilbert: Yes.

The Court: I presume that answers your question, then, does it, Mr. Gilbert?

Mr. Gilbert: That is right.

The Court: Nothing further, gentlemen?

(No response.)

(Whereupon at 2:00 o'clock p. m. court adjourned.)

[Endorsed]: Filed Apr. 7, 1948. Edmund L. Smith, Clerk. [12]

[Title of District Court and Cause]

Honorable Paul J. McCormick, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, Tuesday, December 30, 1947

Appearances:

For the Petitioner: Robert N. Denham, General Counsel, by Dominick Manoli, Esquire, and George H. O'Brien, Esquire, 111 West 7th Street, Room 704, Los Angeles 14, California.

For the Respondents: Robert W. Gilbert, Esquire, Clarence E. Todd, Esquire, and Allan L. Sapiro, Esquire, 117 West 9th Street, Los Angeles 15, California. [1]

Los Angeles, California, Tuesday, December 30, 1947,

10 A. M.

The Court: Mr. Carter?

Mr. James M. Carter: If the court please, in the matter pending in this court, Lebaron v. Printing Specialties, I want at this time to move the admission of two attorneys who are not members, as I understand it, of the State Bar of California, for the purpose of appearing in this case alone. One of them is Dominick Manoli, who is an attorney for the National Labor Relations Board, is a member of the bar of the Supreme Court of the United States, the Federal District Court in Nebraska and the State Bar in Nebraska. The other gentleman is Mr. George O'Brien, member of the bar of the Supreme Court of Illinois and the District Court for the Northern District of Illinois, and is also a member of the bar of the Ninth Circuit. I am personally acquainted with Mr. George O'Brien, have been for a

number of years. Both of these men are attorneys for the National Labor Relations board, and the casual check of the code which I have had a chance to make indicates that under the express wording of the statute the attorneys for this Board possess the statutory right to commence civil litigation. I, therefore, move the admission of these gentlemen for the purposes of this case.

The Court: Any objection, gentlemen?

Mr. Gilbert: No objection. [2]

The Court: For the purposes stated they will be admitted.

Call the case, Mr. Clerk.

The Clerk: 7859-M, Civil, Howard F. Lebaron v. Printing Specialties and Paper Converters Union, et al.; order to show cause why respondents should not be restrained as prayed in petition, and motion of respondents to dismiss petition for an injunction. Attorneys Gilbert and Todd appear for the respondents. Attorneys Manoli and O'Brien appear for the petitioners.

The Court: Are you ready, gentlemen?

Mr. Todd: Yes.

Mr. O'Brien: Yes, we are ready, your Honor.

The Court: We will have to segregate the argument, gentlemen, on these matters. At the previous hearing the court stated that the argument would be permitted to not exceed one day of court time. We will divide the argument two hours on each side, with the respondent having the right to open and close the argument. But the opening must be an opening and not simply the holding in reserve of matters that are not disclosed in the opening.

You may proceed.

Mr. O'Brien: Your Honor, I have a copy of the Act here.

The Court: I have the Act in the code.

Mr. O'Brien: Very well. [3]

Mr. Gilbert: If it is agreeable with the court, with respect to the matter of the opening argument on behalf of the respondents, Attorney Todd and I would like to divide the time which you have allotted to us.

In this proceeding, if it please the court, there is on file, as the court well knows, a petition for an injunction filed by the petitioner under color of authority of Section 10(1) of the National Labor Relations Act as amended. In substance I believe that the petition seeks to invoke that portion of Section 10(1) purporting to confer jurisdiction upon this court to grant injunctive relief against activities proscribed by paragraph (4)(A) of Section 8(b) of this Act, as amended on June 23, 1947. The pertinent portions of Section 10(1) and 8(b)(4)(A) of the Act, we believe, are as follows, quoting first from Section 10(1):

"Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A)"—then omitting some language—"of Section 8(b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable [4] cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any

district court of the United States”—omitting language—“within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: . . .”

The balance of Section 10(1) deals with a proviso with respect to the matter of a temporary restraining order without notice, which is not raised in this proceeding, and the matter of the jurisdiction over a particular labor organization in terms of the district wherein such jurisdiction purports to lie. Then Section 10(1) states:

“The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit.”

The balance of the section deals with matter forbidden by [5] Section 8(b)(4)(D) of the amended Act, and not applicable herein.

Section 8(b)(4)(A), the section incorporated by reference in Section 10(1), as invoked in this proceeding states, insofar as is relevant to this proceeding:

“(b) It shall be unfair labor practice for a labor organization or its agents—

* * * * *

“(4) To engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services where an object thereof is: (a) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; . . .”

The petition which has been filed recites in paragraph 5 on page 2 that:

“On or about November 18, 1947, Sealright [6] Pacific, Ltd. (hereinafter called Sealright), pursuant to the provisions of Section 10(b) of the Act, filed a charge alleging that respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8(b), subsection (4)(A) of the Act and affecting commerce within the meaning of Section 2(6) and (7) of the Act.”

The petition thereafter recites that:

“A copy of said charge is attached hereto marked ‘Exhibit 1’ and made a part hereof.”

In completing service upon the respondents in this matter the conformed copies of the petition and order to show cause did not have attached to them copies of the charge, but counsel for the respondents are familiar

with and have received otherwise copies of that charge and make no objection on that ground. I would like to be permitted to inquire of the court, however, whether a copy of that charge is now an official part of the record.

The Court: I am just now examining the file again this morning to ascertain that. It is not there, unless it has been placed there recently. There is not appended to the copy which was supplied at the time of the filing of the petition the charge.

Mr. Manoli: We will file a copy, your Honor. [7]

The Court: It was not filed, was it?

Mr. Manoli: Apparently it was not. I was not aware of that.

The Court: I haven't seen that. I want to look at it, if you will first submit it to counsel.

(The document referred to was handed to the court.)

The Court: It may be considered as a part of the record, gentlemen?

Mr. Gilbert: Yes, your Honor.

Mr. Manoli: And may we have leave to substitute copies for that, your Honor? It is the original.

Mr. Gilbert: No objection.

The Court: Yes. The court has perused the instrument.

Mr. Gilbert: The charge referred to as Exhibit 1 in substance employs the language of Section 8(b)(4)(A) of the statute itself to allege that the respondent, Local 388, "engaged in, induced and encouraged the employees of L. A. Seattle Motor Express and the employees of West Coast Terminals Co. to engage in a concerted

refusal in the course of their employment to transport or otherwise handle any goods, articles, materials or commodities of Sealright Pacific, Ltd., for the purpose of forcing or requiring L. A. Seattle Motor Express and West Coast Terminals Co. to cease handling, transporting or otherwise dealing in the products of Sealright Pacific, Ltd., or to cease doing business with Sealright [8] Pacific, Ltd.”

Without taking the court's time to read the charge, which the court has before it, the acts alleged in this charge to have been committed by respondent, Local 388, stripped of legal conclusions, in essence amount to a threat of picketing the L. A. Seattle Motor Express and picketing in the vicinity of the warehouses of the West Coast Terminals Co.

The petition itself relates that the charge involved was referred to the regional director of the 21st Region of the National Labor Relations Board, the petitioner herein; that the petitioner investigated the charge, and believes it to be true. And in specifying the acts, again which the respondent local union is alleged to have committed and which is the sole basis for the filing of the petition herein and the claim for the right to injunctive relief under this statute, are acts set forth in paragraph 7, subparagraph (c), (d) and (f), found on pages 3 and 4 of the petition.

(c) is:

“On November 13, 1947, respondent Walter J. Turner, vice-president of Local 388, advised L. A. Seattle that if it continued to handle Sealright's products, L. A. Seattle would be picketed by Local 388.”

(d) is that: [9]

“On about November 14, 1947, representatives of Local 388 followed two trucks loaded with Sealright’s products to the L. A. Seattle terminal where by forming a picket line around the two trucks containing the products of Sealright and telling the employees that the trucks contained ‘hot cargo’ and not to ‘handle it,’ induced and encouraged”—using the statutory language—“the employees of L. A. Seattle, by orders, force, threats, or promises of benefits, not to transport or handle the goods of Sealright.”

In connection with this portion of the petition I would like to call the attention of the court to the language of Section 8(c) of the Act herein involved:

“The expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.”

It will be the position of the respondents throughout this proceeding that the inclusion of the language in the petition herein “by orders, force, threats, or promises of benefits,” constitutes merely a conclusion of law, to be [10] disregarded by the court, and that in fact this language is simply inserted in the petition for the purpose of immunizing this proceeding from the effects of the proviso set forth in Section 8(c) of the amended Act. So that if the factual material in paragraph 7(d), from which I have just read, were considered alone by

the court, without such a conclusion of law, in effect the acts alleged would be that representatives of Local 388 formed a picket line around the trucks which they located at the L. A. Seattle terminal containing the products of Sealright, told the employees certain things, and requested them, or to use the language of the statute which the petition uses "induced or encouraged" them not to transport or handle the goods of Sealright.

The remainder of the paragraph alleges that after this picketing took place, the employees of L.A. Seattle refused to transport or handle the goods of Sealright; and reading from the bottom of paragraph 7 (d) the statement that:

"Local 388 engaged in the foregoing conduct to force or require L.A. Seattle to cease handling or transporting the products of Sealright."

There again, is a reliance upon the statutory language.

Paragraph (f) alleges that:

"On November 17, 1947, while employees of West Coast were engaged in loading the rolls of paper" described in the preceding paragraph "onto [11] freight cars consigned to Sealright in Los Angeles, a group of pickets representing Local 388 appeared at the docks of West Coast and, by forming a picket line around the freight cars being loaded with the rolls of paper for Sealright,"—again the statutory language—"induced and encouraged the employees of West Coast,"—and, again, this language is couched similar to the terms of Section 8(c)—"by orders, force, threats, or promises of benefits, not to handle or work on the paper consigned to Sealright."

Then there is a further allegation of the refusal by the employees of West Coast to handle or work on the goods consigned to Sealright, and an allegation which, in effect, might be paraphrased as an allegation that an object of this picketing was to force or require West Coast to cease handling or transporting the products of Sealright, again couched in the statutory language.

Respondents desire to move this court to dismiss this petition on the ground that the court lacks jurisdiction over the same. It is stated in the notice of motion that it is the contention of the respondents that this petition was filed under color of authority of that portion of Section 10(1) of the amended Act, incorporated by reference, paragraph 8 (b)(4)(A) of said Act "which purports to confer juris- [12] diction upon this court to grant injunctive relief against activities proscribed" by that latter paragraph, and that such portions of the statute as invoked herein are contrary to the Constitution of the United States, Amendments I, V and XIII, and are therefore wholly invalid and without any legal force and effect; that the sole allegation relating to the jurisdiction set forth in the petition herein is based upon the same statutory proceeding, and we move this court to dismiss this proceeding on the ground that the court lacks jurisdiction over the person of the respondents and over the subject-matter of this proceeding for the lack of jurisdiction, and on the ground that the petition prays for injunctive relief against lawful acts of respondents, which relief in substance and form would be contrary to the Constitution of the United States, Amendments I, V and XIII, and that no other claim upon which relief can be granted has been stated.

The prayer for injunctive relief to which I have referred is set forth on page 5 of the petition, and the acts which the petitioner seeks to have enjoined by this court are set forth again in the statutory language:

“(a) Engaging in or inducing or encouraging the employes of West Coast Terminals Co. and Los Angeles Seattle Motor Express, Inc. by orders, force, threats, or promises of benefits, or by [13] permitting any such to remain in effect, or by any other like acts or conduct, to engage in a concerted refusal in the course of their employment to transport, or otherwise handle any goods, articles, materials, or commodities, or perform any services in order to force or require West Coast Terminals Co. and Los Angeles Seattle Motor Express, Inc. to cease handling, transporting the materials or products of Sealright Pacific, Ltd., or to cease doing business with Sealright Pacific, Ltd.”

The second prayer for injunctive relief in paragraph (b) requests a substantially similar order affecting the employees of any employer, but omits the language relating to “orders, force, threats, or promises of benefits.”

Respondents raise the issue here as to whether or not Section 10(1), to the extent that it incorporates Section 8(b)(4)(A) of the amended Act, and purports to confer jurisdiction upon this court to restrain acts such as those alleged to have been committed by the respondent, Local 388, herein, namely, picketing and the threat of picketing in connection with a lawful strike over the issue of wages and holiday pay, picketing and threat of picketing the products of the struck plant, if the court please, produced under strike conditions,—whether or

not such a provision of law [14] is not contrary to the cognate rights of free speech and assembly set forth in the first amendment to the Constitution of the United States, and whether its object and its effect, if enforced and carried out, would not amount to a deprivation of liberty without due process of law, contrary to the fifth amendment of the Constitution, and whether or not the injunctive relief sought herein does not or would not contravene the thirteenth amendment to the Constitution, prohibiting involuntary servitude.

We have requested and received permission of the court to divide this argument, and I will not, in order to avoid repetition, dwell at great length upon the numerous authorities which we have cited in our memorandum of points and authorities, which Attorney Todd would like to present to this court, but I would like to state at the commencement of this portion of the argument that the basic position of the respondents is set forth in paragraphs 3 and 4 of our memorandum of points and authorities, namely, that peaceful picketing and threat of peaceful picketing which constitute the only charges made against respondents in this proceeding come within the constitutional safeguards of the First Amendment; and that, fairly construed and with conclusions of law eliminated, the petition herein merely charges respondents with picketing and threatening to picket the products of the employer with whom a labor dispute is pending, and that [15] picketing of such unfair products is well recognized as coming within the protection of the First Amendment. There is appended to the notice of motion to dismiss this petition an affidavit of one of the respondents herein, Walter J. Turner, whose affidavit is, of course, in the record and I shall not attempt to

take the time of the court to read all of its many details, but in sum and substance it describes the respondent, Local 388, as a labor organization including within its membership approximately 1,800 employees of the paper conversion and allied industries in the city of Los Angeles and nearby communities. It sets out the fact that Local 388 is a party to numerous collective bargaining agreements in this industry with various employers and its members engaged in the manufacture, distribution and sale of products, paper products comparable to the paper food containers and milk bottle caps produced by the charging party in this proceeding, Sealright Pacific, Ltd. Some of these products are set forth in lines 8 and 9 of page 2 of the Turner affidavit: envelopes, paper boxes, waxed paper, manifold sales books, et cetera.

It sets forth in the paragraph immediately following, in lines 12 to 19, of page 2 of the affidavit, the fact that Local 388 has consummated agreements covering approximately 1,500 of its members and establishing certain prevailing scales of minimum wages, which are set forth in the exact [16] sums in the affidavit; but all of these agreements covering some 1,500 members of the union, negotiated within the immediate past 12 months, provide at least six paid holidays for those members of Local 388.

The following paragraph describes the history of bargaining between Sealright Pacific, Ltd. and this local union from 1941 to 1946, during which successive collective bargaining agreements were negotiated without any strike, lockout, or other similar interruption of production taking place.

The affidavit proceeds to relate the circumstances under which the former contract, the latest contract, was

opened, and it is worth noting here that Local 388 complied with Sections 8(d)(1) and 8(d)(3) of the amended Act, by giving the company the required 60-day notice of the proposed modifications in the agreement, and on September 15, 1947 by notifying the Federal Mediation and Conciliation Service and the California State Department of Industrial Relations that a dispute existed, as set forth on lines 14 to 17 at page 3.

The following paragraph describes the content of those negotiations and points out that after a number of meetings, some eleven meetings, the parties were agreed on all terms of the new agreement except wage rates and holiday pay; that the company's offer was substantially below the prevailing rates established by the union for some 1,500 members; that [17] the company offered for the seventy-odd members of the union employed at its plant a raise from \$1.02½ to \$1.10 per hour, whereas the prevailing wage rate ranged from \$1.20 to \$1.33½ per hour for the lowest skilled job performed by a man in the plant. Similarly, the union detailed similar inadequate rates as proposed by the company for the lowest skilled female classification in the plant and, as related at the top of page 4, the company's proposal with respect to holiday pay was merely a continuation of the three designated holidays, although the union had established for a preponderance of its members, some 1,500 in the industry, the prevailing standard of six paid holidays.

The strike which gave rise then to the picketing complained of herein was a strike solely over the issues of wages and holiday pay, based upon the desire of the members of Local 388 to protect the standards which they had established in the paper conversion and allied industries in this area by means of negotiated agreements with various employers during the past 12 months.

As set forth in the next to the last paragraph on page 4, at the time the strike was instituted all of the approximately 70 production employees of the plant were members in good standing of the union and no question of majority status was raised by that fact. All but three employees of said plant joined said strike against their employer. Peaceful [18] picket lines were established in front of or near the entrances to the struck plant.

The succeeding paragraphs of the Turner affidavit describe the conduct of the respondents in connection with the incidents in statutory rather than factual language by the petitioner herein.

It is admitted in the Turner affidavit that at some time between November 3, 1947 and November 17, 1947 Mr. Turner met and conferred with a Mr. Lacey, supposedly the manager of Los Angeles Seattle Motor Express; that at that time Mr. Turner, the secretary-treasurer of the union, informed L. A. Seattle Motor Express that Local 388 was engaged in a strike due to a wage dispute with its employer, Sealright Pacific; also informed him that Local 388 intended to peacefully picket the Sealright products manufactured under strike conditions and a sub-standard wage for the purpose of publicizing the dispute and soliciting the assistance of other workers, asking that they decline to handle this merchandise. At no time did affiant advise Los Angeles Seattle Motor Express that Local 388 would picket all or any of that firm's operations, as such, if it continued to handle Sealright products, nor did Mr. Turner in any way indicate or imply that Local 388 would picket any other products being handled or transported by the L.A. Seattle Motor Express for companies other than the struck plant under [19] any circumstances whatsoever.

On or about November 14, 1947 members of the union on strike at Sealright in this wage dispute, it is admitted by this affidavit, formed a peaceful picket line around two truckloads of Sealright products at the Los Angeles Seattle Motor Express terminal; that these members of the union advised the employees of the motor truck concern that the Sealright products were manufactured under strike conditions and for sub-standard wages and requested them not to handle those products. At no time did any officer, agent, representative, or member of the local union order, force, threaten any reprisal against or promise any specific benefit to any employee of that concern for the purpose of bringing about the refusal of said employee to transport or handle Sealright products, or for any other purpose.

It is also admitted in the following paragraph of the affidavit that on or about the 17th day of November of this year, and for several days thereafter, Local 388 peacefully picketed Sealright products being loaded onto three boxcars at the West Coast Terminals Company; that these products consisted of rolls of paper consigned from a New York plant of Sealright, the struck employer, to the Los Angeles plant of that corporation for use in continued manufacturing operations under strike conditions. At no time has Local 388 picketed any or all of the operations of the West Coast [20] Terminals Company, as such, nor has Local 388 picketed any other products being handled or transported by said firm for companies other than the struck plant. At no time has Local 388 interfered in any manner with the loading or unloading of any ship or ships of the Panama Pacific Lines or of any other steamship company.

The following paragraph and the next concluding paragraph of the affidavit describes the fact that this picketing of the boxcars containing Sealright products took place alongside a siding near the warehouse; that the picket lines did not pass in front of the entrance to the warehouse, and that when during the course of the picketing it was necessary for the Terminal Company to move those cars incidental to its other operations Local 388 temporarily discontinued its picketing to permit it, rather, Local 388 temporarily discontinued its picketing and there was no interference with the moving of these boxcars, and when the cars had been moved on several occasions and returned to their previous position, then the picketing was resumed.

Again there is a denial in the affidavit that any force or promise of benefit or threat of reprisal or order of any sort was made by any representative of Local 388 to the employees at the West Coast Terminals Company. With this factual background set forth in the affidavit, we believe that the issue is very sharply presented, as to whether or not the members of the respondent union and the representatives of the respondent union [21] have a right to seek to persuade employees of companies other than their own employer not to lend their assistance to the struck plant, and whether or not they have a constitutional right to seek to disseminate the fact of the labor dispute in the hope that they may be able to convince other working people of the merits of their cause within the immediate area of the industrial dispute by picketing the products manufactured at the struck plant under strike conditions and at wage rates below the level established by the union in the industry in the community.

specifically the language of Section 8(b)(4)(A) does not mention picketing as such, as it does not mention speech as such. It seeks to embrace in verbal speech the communication of ideas by means of carrying a placard back and forth in the vicinity of the plant, and, apparently, other means of communication of the labor dispute by the very broad language which would make it an unfair labor practice for a union or its representative to induce or encourage the employees of an employer to strike or concertedly refuse to handle the products of the struck plant. Such language has been passed upon by the Supreme Court of the United States in the various cases identifying picketing with free speech. And the issue here is particularly vivid in the minds of the members of the local bar because on October 3, [22] 1947 the Supreme Court of this State applied the constitutional guarantees set forth in the First Amendment to strike down a State law which, in effect and with similarly vague language, sought to include within its ambit activities within the protection of the guarantees of free speech and assembly. Of course, I am referring to the case of *In re Blaney*, which is cited under point I of our memorandum of points and authorities. This decision of the Supreme Court of the State of California, like the decision of a three-judge court sitting in the District of the State of Kansas, in the case of *Stapleton v. Mitchell*, which is reported at 60 Fed. Supp. page 51,—

The Court: Is that cited in the memorandum? I don't remember it.

Mr. Gilbert: I don't believe it is, your Honor.

The Court: You say 60 Fed. (2d),—what page?

Mr. Gilbert: Federal Supplement, your Honor, page 51. We believe that both of those decisions are highly

persuasive authority, that they rely expressly upon the decisions of the Supreme Court of the United States, identifying the right of picketing with free speech and delimiting and defining the scope of this constitutional right to disseminate the facts of a labor dispute.

The Court: Pardon me, Mr. Gilbert.

Mr. Gilbert: Yes, your Honor. [23]

The Court: Was that last citation a decision under the Labor Management Act of 1947?

Mr. Gilbert: No, your Honor. Like the California case, it is a decision under a State statute, the so-called Kansas Industrial Peace Act, but the language and the design and plan of these State laws invalidated by these decisions is extremely comparable to the provisions under attack in the present proceeding.

In the Blaney case the Supreme Court of the State of California dealt with the so-called "hot cargo" and secondary boycott act of this State, which defined a secondary boycott as "any combination or agreement to cease performing or to cause any employee to cease performing any services for any employer, or to cause any loss or injury to such employer, or to his employees, for the purpose of inducing or compelling such employer to refrain from doing business with, or handling the products of any other employer because of a dispute between the latter and his employees or a labor organization."

That particular provision of California law which was held invalid as contrary to the protections of the First Amendment contained as well a so-called separability clause, which I would like to touch upon briefly. That separability clause, set forth in Section 1136 of the

Labor Code of the State of California and a part of this general Act stated: [24]

“If any provision of this chapter, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of this chapter, or the application of such provisions or persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.”

The comment of the court in the decision in that case by a vote of six members of that court was that that separability clause could not save the Act and that the Act was subject to objection because its language was so vague and indefinite that men of common intelligence might differ as to its meaning and application; and, further, that its terms were so sweeping and broad as to include within its scope acts which the State might lawfully prohibit, and speech and assembly which the State might not lawfully prohibit, and since the provisions of that Act, generally describing the prohibited conduct, were not mechanically severable, there was not a section directed to picketing, a section directed to a publication of an unfair list, a section directed to making speeches at meetings, a section directed to, let us say acts of violence, and so on, mechanically severable so that the various descriptions of conduct described or proscribed might be segregated by the court, the court had no choice but to invalidate the entire Act. [25]

The Court: Is there any provision in the California statute that used, either expressly or synonymously, the word “force”?

Mr. Gilbert: The California Act uses the word “compelling,”—uses the term “for the purpose of inducing or compelling.”

Now, I confess, your Honor, difficulty with some of these very broad terms like "promises of benefits" or "threats of reprisal," or "inducing" or "encouraging" or "compelling," rather than a description of the subjective acts.

The Court: I am speaking of "force," not the other connotations.

Mr. Manoli: The word "force" is not used.

Mr. Gilbert: The word "force" is not used. There is the term "compelling," which would be perhaps the closest approach to it, although that would perhaps call for an analysis of the legislative intent.

The Court: Isn't the connotation of the word "force" perhaps the enforcing of some physical effort?

Mr. Gilbert: I think so.

The Court: I am not speaking of the economical purpose. I am speaking of physical acts.

Mr. Gilbert: Of physical acts. Of course this Act itself does not describe the prohibited conduct in terms of using force, or compelling, or inducement, or reprisal. [26]

The Court: You are speaking of the Federal Act now?

Mr. Gilbert: The Federal Act. It only refers to threat of reprisal or force or promise of benefit in Section 8(c), to which I have referred.

The Court: The terms there used are as follows:

" . . . if such expression contains no threat of reprisal or force or promise of benefit."

Mr. Gilbert: Yes. And it is interesting to note there—

The Court: Let's follow it a little further to get your views of the analogy of the decision of the California Supreme Court. It is conceded by your associate, as I understand it, in the Federal Act there is a differentiation, in that the Federal Act uses the word "force," and there is no use of such word in the California statute.

Mr. Gilbert: That is true.

The Court: Is it your argument that the use of the word "force" in the Federal statute is so broad and all-inclusive that it would necessarily involve these other features that were discussed in the main opinion of the California Supreme Court?

Mr. Gilbert: No, your Honor. I believe that the problem here is raised by the fact that the terms "threat of reprisal or force or promise of benefit" are used in the alternative; in the disjunctive rather than in the conjunctive; that the expression of any views will not constitute or be [27] evidence of any unfair labor practice under the Act if it does not contain force, that is one thing, but then it states in the alternative "or threat of reprisal or promise of benefit," so that it is not limited simply to situations in which force exists.

We would concede, and I know that my associate would certainly want to elaborate upon the fact that there is clear indication by the Supreme Court that where force or violence is present a basis exists under existing law for relief. In other words, that a State may adopt as a matter of policy, or the Federal Government could adopt as a matter of policy the idea of injunctive relief against acts of force or violence. But in the present statute, and in the petition itself filed in this action there is no allegation that force of any sort was em-

ployed. The affidavit of Turner clearly establishes the completely peaceful character of the picketing, and the language used in the petition is again in this disjunctive sense, that the respondent by threat of reprisal, order, or force, or promise of benefit brought about this result, with no factual material supporting that conclusion of law based upon the statutory language.

The Court: Is there a statutory provision in the Federal Act of segregation of rights, as there is in the State statute which you have just read?

Mr. Gilbert: The separability provision? [28]

The Court: Yes.

Mr. Gilbert: Yes, Section 16.

The Court: Read that.

Mr. Gilbert: "If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby."

It is almost verbatim from the separability provision in the California statute. In that connection I would like to call the attention of the court to Section 12, or, rather than that section, it refers to a section immediately following Section 12 of the Kansas Statute invalidated in *Stapleton v. Mitchell*, and the portion of the statute to which I have referred is found in 60 Federal Supplement, page 56, where the court says:

"The Act also contains a severability clause to the effect that if any provision of the Act or the application thereof," and so on, using almost identical language with Section 16 of this Act.

The Court: Supposing there had been the use of the word "force" in the California statute, do you think the main opinion of the court would still stand? [29]

Mr. Gilbert: If I understand the question of the court, it is as to whether if in the California statute there had been an effort to prevent interference with the handling of goods or merchandise by force,—

The Court: That is not what I said.

Mr. Gilbert: I am trying my best to understand. (Continuing) —if there was language in the California statute which made unlawful a combination or agreement or any act to cause any employee to cease performing services by force or threat of reprisal or promise of benefit, I would believe that the decision would be exactly the same. To summarize the basic position which I have attempted to outline, I would like to just make brief reference initially to the language contained in the Kansas statute invalidated in *Stapleton v. Mitchell*. There subsection 12 of Section 8 of that Act was declared by the court to be unconstitutional and void on its face, making it unlawful for any person to refuse to handle, install, use or work on particular materials or equipment and supplies because not produced, processed, or delivered by members of a labor organization. And, also, the court held invalid and void on its face Section 8(3) of that statute, making it unlawful "to participate in any strike, walkout or cessation of work or continuation thereof without the same being authorized by a majority vote of the employees to be governed, . . ." [30]

There was in the Kansas statute a provision, Section 12, "except as specifically provided in this Act, nothing therein shall be construed so as to interfere with or impede or diminish in any way the right to strike or the

right of individuals to work; or shall anything in this Act be so construed to invade unlawfully the right to freedom of speech."

That is the so-called saving clause.

There is a so-called saving clause in Section 502 of the entire Labor Management Relations Act of 1947 of similar scope. The result in the Stapleton case, as in the Blaney case in California, was to state that individual citizens should not be placed upon their peril to determine whether or not conduct, which is traditionally regarded as an exercise of their right of free speech, publication and assembly falls within the purview of the statute which expresses its prohibition in vague and indefinite terms.

We have cited to the court in this connection in point VII of the memorandum of points and authorities the various decisions holding that a statutory provision which does not aim specifically at particular evils, but attempts to blanket conduct in general terms and sweeps within its ambit activities that in ordinary circumstances constitute an exercise of freedom of speech would be held to be invalid on its face. And under point VIII we have dealt with the [31] doctrine as to vague, indefinite and uncertain terms, as set forth by the Supreme Court of the United States, and as applied in the Blaney case, and in another picketing case, the Bell case, by the Supreme Court of the State of California.

We have also dealt in this memorandum, and I will not now belabor the separability clause in Section 16, with the fact that where there is no possibility of mechanical severance, but the general language of the statutory provision covers both activities which might be

prohibited and activities which might not, that the entire section must be nullified.

Finally, there is here the entire question of involuntary servitude. That matter is dealt with briefly in the case of *Stapleton v. Mitchell*. The petition herein seeks to secure injunctive relief against members of Local 388, and Mr. Turner, from engaging in a concerted refusal in the course of their employment to transport, or otherwise handle any goods, and from inducing or encouraging others by orders, force, threats, or promises of benefits, or by any other like acts or conduct to engage in a concerted refusal to handle these struck products.

There is one statement that I would like to quote from, which is set forth on page 2 of the memorandum, which I think is the nub of this case. It is a statement of Mr. Justice [32] Rutledge in the case of *Thomas v. Collins*, that:

“ . . . ‘Free trade in ideas’ means free trade in the opportunity to persuade to action, not merely to describe facts . . . and the right either of workmen or of unions under these conditions to assemble and discuss their own affairs is as fully protected by the Constitution as the right of businessmen, farmers, educators, political party members, or others to assemble and discuss their affairs and to enlist the support of others.”

Again, Mr. Justice Rutledge in another portion of the same opinion, for the court states:

“ . . . Indeed, the whole history of the problem shows it is to the end of preventing action that repression is primarily directed and to preserving the right to urge it that the protections are given.”

Whether the device, the statutory device, to narrow the circle of a labor dispute is that it only includes an employer and his own employees, and would prevent members of the public or prevent including other working people from getting the facts of the dispute, whether that is achieved by a statutory definition of the term "labor dispute,"—

The Court: Pardon me, Mr. Gilbert. I will have to interrupt to answer a phone call. One of our judges is very sick, and I would like to answer a call from his wife. We [33] will recess for about five minutes.

(A short recess was taken.)

The Court: I am sorry to interrupt you, gentlemen. You may proceed.

Mr. Gilbert: In the memorandum of points and authorities there is reference to two cases standing for the proposition that whatever the legislative judgment, the court must determine independently in the light of our constitutional tradition whether a clear and present danger of the gravest abuses endangering society as a whole exists to justify the intrusion upon the domains of free speech and assembly, which we believe are created by virtue of Section 10(1) and Section 8(b)(4)(A) of the amended Act.

It is true, as was stated by the court in the Thomas case, that:

" . . . Where the line shall be placed in a particular application rests, not on such generalities, but on the concrete clash of particular interests and the community's relative evaluation both of them and of how the one will be affected by the specific restriction, the other by its absence."

The answer to the question as to where that line can constitutionally be placed under our tradition can be affirmative to supporting an intrusion upon the domain of [34] free speech only if grave and impending public danger requires, and we believe that there is no showing, either in the legislative history of this particular statute, or the facts that may be gleaned from an analysis of the factual matter in the petition or the charge filed in this proceeding that such an injunction against peaceful picketing and other forms of free speech and assembly is warranted by an immediate threat to the existence of our society, as we have known it.

I appreciate the courtesy of the court in listening to this portion of the argument, and I would like now to retire in favor of Mr. Todd.

Mr. Todd: May it please the court, would your Honor indicate exactly the amount of time that I have left?

The Court: I think I took out about twenty-five minutes. That would leave you about an hour and thirty-five minutes.

Mr. Todd: If I have an hour, I would like to reserve half of it for rebuttal, because we haven't been favored with any brief by the complainant, and I would like to be able to answer them.

The Court: Yes. I noticed that the government has not complied with the local rule with respect to a memorandum. If you gentlemen are going to practice in this district you had better get a copy of our local rules and read them, and be governed accordingly. [35]

Mr. Todd: May I move that any particularity may be suspended, if the court please?

The Court: We will take that under advisement.

Mr. Manoli: We shall want to submit a memorandum, your Honor.

Mr. Todd: With regard to the question asked by your Honor about the use of the word "force," which is not found in the California Act, but is found in the Federal statute which we have before us. I call your Honor's attention to the fact that the word "force" is not used in describing the offense. The offense is described in substantially the same language as found in the "hot cargo" Act. In legal effect, the legal phraseology is not exactly the same.

I shall want to show you in a few minutes, as far as I have time, the pattern, the definite pattern laid down by the Supreme Court of the United States, and, incidentally, by the Supreme Court of California also, as to the allowable limits of picketing, and the use of force is absolutely outlawed by both courts. Any use of force in connection with picketing is entirely unlawful.

I might refer just very briefly to the decision of the Supreme Court of California in the Bell case, which is reported at 19 Cal. (2d) 488, and I want to refer very briefly to page 491, in which there appears the test of an ordinance of the County of Yuba, which was invalidated by the Supreme Court of [36] California insofar as it sought to prohibit peaceful picketing, and the particular section referred to there is:

"It is unlawful for any persons to beset or picket the premises of another, or any approach thereto, where any person is employed or seeks employment, or any place or approach thereto where such employee or person seeking employment lodges or

resides, for the purpose of inducing such employee or person seeking employment, by means of compulsion, coercion, intimidation, threats, acts of violence, or fear to quit his or her employment or to refrain from seeking or freely entering into employment.”

Now, the portion of the ordinance which sought to prevent peaceful inducement of a person working at a certain place through a picket line was set aside, but insofar as the ordinance sought to prevent acts of violence or fear, it was upheld.

Similarly, I notice in the decision of the Supreme Court of the United States, that the case of *Carlson v. California* involved a statute of the county of Shasta. That decision is cited at 310 U.S. 106, and there was a long ordinance prohibiting anyone from carrying a banner, loitering in front of, or in the vicinity of, or to picket in front of, or in the vicinity of, or to carry, show or display any banner, [37] transparency, badge or sign in front of, or in the vicinity of, any works, or factory, “for the purpose of inducing or influencing, or attempting to induce or influence, any person from doing or performing any service or labor in any works, factory, place of business or employment, or for the purpose of intimidating, threatening or coercing, or attempting to intimidate, threaten or coerce any person. . . .”

That uses the word “intimidation” and uses the word “coercion,” which our Supreme Court of California has defined as being perfectly lawful, if lawful means are used, and providing only peaceful means are used. That entire ordinance was set aside by the Supreme Court. That was a companion case to *Thornhill v. Alabama*, where the Alabama statute was set aside.

The issue here has been tendered by the government, and the issue is very narrow. The issue is really the lawfulness of three or four elements of the Taft-Hartley Act, which attempts to prohibit the boycotting or picketing of a product,—“hot cargo,” in other words. That is the entire matter, that is the entire factual issue which is before the court, and we have it on the authority of Chief Justice Marshall, and I believe it was in the case of *Ogden v. Saunders*, and I have forgotten just what the case was about, but I know he said that the jurisdiction of the court is limited by the facts before the court. So that the court's [38] jurisdiction here, the court's power here is limited to a consideration of the facts that are before the court, and the facts before the court are, first, a statute which seeks to prevent the picketing of the products of a struck employer, and the acts alleged as constituting the offense are the acts of picketing those products.

As my colleague has pointed out, the use of the word “threat,” or whatever the language is in that saving clause, is simply thrown in. It is really “fear,” and that is really a frank way of presenting the issues here.

This section under which the court is proceeding, that is, the section purporting to set out the unfair acts, Section 8(b)(4)(A) is:

“(4) To engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services where an object thereof is:

“(A) Forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other [39] producer, processor, or manufacturer, or to cease doing business with any other person;”

That must be read along with the language of subsection (c) later:

“The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promises of benefit.”

That has to be read with it, and what it means is that if this encouraging or inducing an employer is carried on by means of speech, either oral or written, it is not unlawful unless it contains a threat of reprisal or force or promise of benefit. That is the language of the Act that must be given effect, and if it is given proper effect, under the very terms of the Act I submit there is no offense here. But I would like to go into the constitutional question which we had up for so many years in our fight against the “hot cargo” Act in California. The reason why the Blaney case cited by Mr. Gilbert is pertinent here is that the decision there, by six out of seven of the California Supreme Court justices, that the “hot cargo” Act was unconstitutional and could not serve as a basis for imprisoning a man for [40] contempt of court for picketing a product, rests

on the decision of the Supreme Court of the United States and only secondarily on the decisions of the Supreme Court of California.

In order that I may make my opening a real opening so far as the constitutional phase is concerned, which your Honor very properly required should be done, I am going to state that the Supreme Court of the United States has set out a definite pattern of what picketing is lawful and what picketing is unlawful, and that the picketing of a product such as is found here is definitely within the lawful area. I will show you the decisions, or, I will cite the decisions as far as I have time within the half hour, and I will invite counsel's comments upon them.

The Court: Pardon me' Mr. Todd. If you want to recess now until this afternoon, I think this would be a good time. It is just about 12:00 o'clock.

Mr. Todd: Very well. Thank you, your Honor.

The Court: 2:00 o'clock, gentlemen.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p. m. of the same day.) [41]

Los Angeles, California, Tuesday, December 30, 1947.

2 P. M.

The Court: You may proceed.

Mr. Todd: May it please the court: I am going to try to cover quite a little territory in a little time, so if I move rapidly from one point to another that will be the reason. I would like to remind your Honor at this time that practically every case I am going to cite is a decision annulling some statute for contravening the provisions of the First Amendment. Almost every deci-

sion will be such a case, so that there is nothing new about the situation we have here.

The Taft-Hartley bill is the subject of a very heated discussion in the newspapers and elsewhere, but in this court it is just a law, and another statute that has to be measured up by the Bill of Rights. The charge made against our clients here is picketing, and we must understand what picketing is. Picketing is variously referred to as merely carrying a banner up and down, and the exercise of free speech without having any particular effect upon anybody, but let us see what the Supreme Court of the United States means when it speaks of picketing.

We turn to the Thornhill case, which was the first case in which picketing was upheld in a decision discussing the matter elaborately. Of course, in the same case picketing [42] was referred to as a constitutional right in the year 1937, but it wasn't until April, 1940, when the Thornhill and Carlson cases came down, that the Supreme Court actually argued out the question. I want to refer to the Thornhill case for two reasons; first, for the purpose of showing just what the court means when it speaks of picketing as a means of publicizing a labor dispute. But, first, I would like to speak of what we mean when we say that the rights secured by the First Amendment are cognate rights, and that the rights secured to us by the Constitution are freedom of speech, freedom of worship, freedom of assembly, and freedom of the press. And freedom of picketing is referred to there with freedom of speech. When the Supreme Court decided that that is the exercise of free speech, it had no previous line of decisions to cite, but here are the cases which it cites to support the proposition that free-

dom of speech is protected by the First Amendment, referring, of course, to the facts before the court, which were peaceful picketing. They cited the Schneider case. That is all found at page 95, 310 U. S. The Schneider case was a case holding it was a constitutional right to distribute handbills. *DeJonge v. Oregon* was a case which upheld the freedom of assembly. *Grosjean v. American Press Co.* involved freedom of the press, and *Near v. Minnesota* held that a State statute of Minnesota which sought an injunction against the [43] publication of a libel was unconstitutional. *Stromberg v. California*, which we cite, was the red flag case, holding that anyone had a constitutional right to raise the red flag if they wanted to. And *Gitlow v. New York* is the case which was the criminal anarchy case, in which the conviction of Gitlow was upheld, but Justice Brandeis and Justice Holmes dissented.

Now, that will illustrate what I mean by saying that these rights are cognate rights, as stated in *Thomas v. Collins*. In the *Meadowmoor* case the Supreme Court said they are all facets of the same right, so that all the rights stand or fall together; the right of free speech, freedom of assembly, freedom of worship and freedom of the press all stand or fall together.

I want to refer to the *Thornhill* case to show what the Supreme Court meant when it says that the petitioner has the right to picket. Here is the statute of the State of Alabama:

“Loitering or picketing forbidden.—Any person or persons, who, without a just cause or legal excuse therefor, go near to or loiter about the premises or place of business of any other person, firm, corporation, or association of people, engaged in a

lawful business, for the purpose, or with the intent of influencing, or inducing other [44] persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons, firm, corporation, or association, or who picket the works or place of business of such other persons, firms, corporations, or associations of persons, for the purpose of hindering, delaying, or interfering with or injuring any lawful business or enterprise of another, shall be guilty of a misdemeanor, but nothing herein shall prevent any person from soliciting trade or business for a competitive business.”

All right. Now, that describes picket for the purpose of boycotting,—picketing pursuant to a boycott.

When the Supreme Court in the course of the opinion several times refers to picketing as being the exercise of the right of free speech, it refers to it as publicizing of a labor dispute. That is what they mean; for the purpose of keeping people from trading with that place where they have a labor dispute. That was the opinion of the Supreme Court of the United States handed down in April of 1940 unanimously,—a unanimous decision that has always been upheld. So we know now when the Supreme Court of the United States speaks of picketing they speak of it for the purpose of establishing a boycott.

I want to refer again to the case of *Thomas v. Collins* [45] on this point. Counsel may tell you that this statute must be presumed to be constitutional. This statute stands here naked, without any presumption of constitutionality because of the high favor granted to free speech, and I

will read you the language of the Supreme Court of the United States in *Thomas v. Collins*, 323 U.S., reading from pages 529 to 530:

“The case confronts us again with the duty our system places on this Court to say where the individual’s freedom ends and the State’s power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment.”

So there is no question of the constitutionality in favor of this right secured by the First Amendment. On that same point see the case, which is possibly not in our memorandum, but I would like to cite it: *Ex parte Mitsuye Endo*, 323 U.S. 283, at 289.

It is hardly necessary to cite to your Honor other authorities holding that these personal rights preserved by the First Amendment are highly favored by the courts, as indicated by *Thomas v. Collins*, and they are favored over [46] property rights. Property rights are not in the same class with personal rights, so far as the favor of the courts is concerned, and that is illustrated by two cases which are in our points and authorities, *Marsh v. Alabama* and *Tucker v. Texas*, two cases which involve somewhat the same facts. They involved the right of free speech in trespass. In each case there was a statute of the State prohibiting anybody from trespassing after being ordered to leave. I believe it was a Jehovah’s Witness case, in which the person persisted in exercising the right of free speech. She chose not to get away the

ten feet necessary to get off the property, she was convicted, and the conviction was reversed in each case by the Supreme Court of the United States.

Now, I said I would define the meaning of lawful picketing, and in doing so I must watch my time. In the first place, picketing is defined by the Supreme Court of California, and in much the same language and intent by the Supreme Court of the United States as being picketing with regard to a dispute having some reasonable relevance to labor conditions. That was the Thornhill case, *Carlson v. California*, *Swing v. A. F. of L.*, *Cafeteria Employees Union v. Angelos*, and in California the *McKay* and *Smith Market* cases. One decision which is cited against me in almost every one of these cases is, namely, *Dorchy v. Kansas*, an old case, 272 U.S. 306, at 311, where a union was picketing to collect a stale claim [47] belonging to one of its members, and the Supreme Court of the United States, through Mr. Justice Brandeis, very properly held it was not a proper subject of picketing, that it had no relevancy to a labor dispute. So that fixes the fence or bar or boundary on that side, that picketing must have relevance to a labor dispute.

Then, picketing must be peaceful. The *Meadowmoor* case has been cited, where it was held where there was violence and a threat of violence continued the picketing must be stopped while the imminence of the threat of violence continued, but only so far; that the picketing could go on whenever it became peaceful.

The pattern will be shown by four decisions in one volume of the Reports of the Supreme Court of the United States, in Volume 315. There we have the *Hotel & Restaurant Employees Local v. Employment Relations Board*, 315 U.S. 437. That possibly may not be in our

points and authorities. That was a case where the Supreme Court—just let me check my citation on that to be sure that I have it exactly right. There were four cases involving the right of limiting the picketing.

The Court: Is that the Ritter's Cafe case?

Mr. Todd: That is one of the four cases.

The Court: I see.

Mr. Todd: I am right on the Hotel & Restaurant Employees [48] case. That is 315 U.S. at 437, and there it was held that where an injunction or where a restrictive action by the Employment Relations Board forbid only violence, it would not be disturbed by the Supreme Court. There was a very hot fight over the case, and a petition for rehearing was granted; the Supreme Court of the State of Wisconsin explaining that all they were preventing was violence. That illustrates that violence may be prevented by a State, because the State always had the right to keep the peace.

Now, another case there was the Allen-Bradley case. That also came from Wisconsin, the Allen-Bradley case, 315 U.S. 740. That was where the Supreme Court upheld the injunction so far as it prevented violence or physical obstruction of entry and egress or mass picketing, or picketing at the homes of employees. Picketing of those various types was prohibited because the State has the right to keep the peace in connection with picketing or in connection with anything else. That is two of the cases. The other two are the Wohl case, 315 U.S. 769. That is a case that comes very close to the facts in the case at bar. That was a case in New York where the Bakery Drivers were having a controversy with the wholesale bakers and picketed the bread in the hands of customers of their for-

mer employers. That, again, was a unanimous decision of the Supreme Court of the United States upholding that picketing is a constitutional [49] right, although apparently prohibited, or the courts of New York thought it was prohibited by the State of New York as not being a true labor dispute. Yet the Supreme Court of the United States upheld that right of picketing a product, which is just exactly what we have before us in this case.

The fourth case is the Ritter's Cafe case, which I have cited against me in every case of this character that I have had in recent years since the case was decided, and there is one paragraph which they always leave out, and I am going to read that paragraph to your Honor so that you will have it.

That was a case where a man who owned a cafe down in Houston, or one of the Texas cities, which was fully unionized, was putting up a building a mile and a half away which, so far as the record showed, had no connection whatever with the cafe. His contractor had some trouble with the Carpenters & Joiners Union, and the Carpenters & Joiners first picketed the contractor. The case got to the Supreme Court eventually and they said they had a perfect right to picket the contractor and picket the contractor's business, but they could not picket the cafe because it had no nexus, it had no economic interdependence with the construction job which was the subject of the dispute. Now, I want to just read you the paragraph which the other side never cites, at [50] page 737. No, it isn't 737. It must be 727. Yes, 727:

"Texas has undertaken to localize industrial conflict by prohibiting the exertion of concerted pressure directed at the business, wholly outside the economic context of the real dispute,"—by definition

that would not have included that among the definitions of picketing—"of a person whose relation to the dispute arises from his business dealings with one of the disputants. The State has not attempted to outlaw whatever psychological pressure may be involved in the mere communication by an individual of the facts relating to his differences with another. Nor are we confronted here with a limitation upon speech in circumstances where there exists an 'interdependence of economic interest of all engaged in the same industry,' " citing the famous *Swing* case, and others.

Then it goes on:

"Compare *Journeyman Tailors Union Local No. 195 v. Miller's*," and so on, and then it goes on further:

"The line drawn by Texas in this case,"—that is holding that there must be a common interdependence—"is not the line drawn by New York in the *Wohl* case. The dispute there related to the conditions under which bakery products were sold [51] and delivered to retailers. The business of the retailers was therefore directly involved in the dispute."

Just as you have here, the product is directly involved in the dispute.

"In picketing the retail establishments, the union members would only be following the subject-matter of their dispute."

And the *Wohl* case, as I say, was decided unanimously, upholding the right to picket the product.

I want to read just a short paragraph from a leading case with regard to the picketing of a product in the

State of California, and I am referring to the case of *Fortenbury v. Superior Court*, 16 Cal. (2d) 405, and, as I say, I want to read just a paragraph from page 408. This was one of the *McKay* cases in which picketing was upheld as a constitutional right:

“Although the respondent argues that a person secondarily boycotted is an innocent third party caught between the upper and lower millstones of an industrial dispute in which he has no interest, this is clearly not correct.”—This is the language of Mr. Justice Edmonds, speaking for the Court—“One who sells a product of a merchant or manufacturer engaged in a labor dispute with his [52] employees, inescapably becomes an ally of the employer. He has a direct unity of interest with the one against whom labor’s complaint is directed. By providing an outlet for that product, he enables the employer to maintain the working conditions against which labor is protesting.”—Which Mr. Gilbert told you about this morning from the affidavit—“And unless the union is allowed to follow the product to the place where it is sold and to ask the public by peaceful representations to refrain from purchasing it, the workers have no real opportunity to tell their story to those whose interest or lack of interest will, in large measure, determine the issues in dispute.” Citing the New York case of *Goldfinger v. Feintuch*, which I believe was one of Mr. Justice Cardozo’s decisions.

Now, to get back here a moment, the Supreme Court in fixing this area within which picketing will be upheld, and this area is referred to in the *Blaney* case, in general said that picketing cannot be limited to a dispute between an employer and his own employees. That really

brings up the whole issue of secondary action. If picketing of a labor dispute could be limited to an employer and his own employees, then, of course, the worker would be very much hampered in collective action. So our Supreme Court in *Swing v. A. F. of L.* [53] which is cited in our memorandum held that workers in the same industry, though not working for the same employer, were interested in the conditions at his place. That was a case where there was picketing by the beauticians of beauty parlors not unionized. That is reported in 312 U.S. It is right along as a companion case to the *Meadowmoor* case, in 312 U.S. I can give you the citation, although I am sure it is in our points and authorities. It is 312 U.S. 321. That was decided and that is reported in 312 U.S. In 315 U.S. we have the *Ritter's Cafe* case.

Now I want to cite another case decided after the *Ritter's Cafe* case, and making exactly the same holding as in the *Swing* case. I am referring to the *Angelos* case, *Cafeteria Employees Union v. Angelos*, reported in 320, I believe it is, 320 U.S. I am sure it is. Yes, here we are. *Cafeteria Employees Union v. Angelos*, 320 U.S. 293. That was where a cafeteria was apparently, according to one contention, being run by its owners, they had no employees, and they were picketed by the Culinary Workers, and the point was raised, or, in the first place, they claimed the pickets should not have said things about them, that they were Fascists, and so forth, and Justice Frankfurter said that was a part of the key and character of industrial disputes. But one of the points raised was that these people were outsiders, they were not employees, and it was argued they had [54] no right to demonstrate or picket this particular

place. So the Supreme Court upholds the right to picket and uses the same language previously used in the *Swing* case. The court said, and this is quoting from the decision at the end of page 295 and page 296:

“ . . . The court here, as in the *Swing* case, was probably led into error by assuming that if a controversy does not come within the scope of State legislation limiting the issue of injunctions, efforts to make known one side of an industrial controversy by peaceful means may be enjoined. But, as we have heretofore decided, a State cannot exclude working men in a particular industry from putting their case to the public in a peaceful way ‘by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him.’ ”

That quotation is from the *Swing* case.

The court does not permit such a restriction of the circle of economic competition, and, as I say, that raises the whole question of secondary action, which is involved in the case we have before us.

Now, the cases I have cited hold that where picketing fulfills these various conditions, that is, where picketing is in a dispute reasonably relevant to labor conditions, where [55] it is peaceful, where it is not limited to the economic nexus, or, rather, where it is where it does come within the economic nexus, within the economic interdependence, it may be freely carried on.

That is so held in the *Ritter's Cafe* case, the *Wohl* case, the *Park & Tilford* case, which is a California case cited in our points and authorities, and in the *Blaney* case.

Incidentally, I might refer to this case. I have many other authorities here which I could cite, but I don't think it is necessary in this opening argument. Your Honor is familiar with the fine set of works called the Restatements of the Law. The Restatement of Torts came out, I believe, in 1939. That was before the constitutional decisions upholding the constitutional right of picketing, so those volumes must have been worked up way along in the '30s, long before there was any recognition of the constitutional right of picketing. The authors of the work found great difficulty in defining "boycott," as many other people have found. So they did not use the word "boycott." They described the acts, and they upheld the secondary boycott. That isn't binding upon this court in this particular case because we say you have no jurisdiction because this statute contravenes constitutional rights. But it is certainly interesting to note that a group of representative lawyers working up a restatement of the law should recognize a secondary [56] boycott as one of the normal incidents of an industrial dispute and should have upheld the secondary boycott if carried on without violence and without fraud and the other norms.

I should like to save the rest of my time for rebuttal, and I thank your Honor for your attention.

Mr. Manoli: I would like to take a moment, if the court please, at the outset to discuss the nature of these proceedings. These proceedings are brought on behalf of the Board's Regional Director in the Los Angeles office by virtue of Section 10(1) of the Act. Section 10(1) of the Act provides that whenever it is charged that a violation of Section 8(b)(4)(A) has been committed, or other subsections of Section 8(b)(4), and

the regional director finds there is reasonable cause to believe that the charges are true and that a complaint by the Board should issue, then the regional officer or the person to whom the investigation has been assigned shall make application to a District Court for appropriate injunctive relief, pending the adjudication of the matter by the Board.

Under the Board's rules, whenever we apply for or file a petition of this kind, we are required, or, the regional office is required to issue a complaint against the respondents. The complaint starts the proceedings before the Board, the matter then is taken up before the Board's trial [57] examiner, who hears the evidence, the testimony in the case, and then he, in turn, files an intermediate report. The intermediate report goes to the Board and the Board then decides the case for itself. Upon the Board's order either denying relief to the charging party, or finding that there is an unfair labor practice committed by the respondents, whatever party is aggrieved may then appeal to the Circuit Court of Appeals, whichever one is appropriate, and there test the Board's order as to whether or not it is proper and lawful, and upon the decision of the Circuit Court of Appeals there may be an appeal to the Supreme Court.

What I am trying to bring out is the narrow issue which is before the court, as we conceive it, apart from the constitutional questions involved in this case. The issue, as we see it, before this court is not so much to determine the merits of the case. The merits of the case under the statutory scheme would be decided by the board initially, and by the Circuit Court of Appeals, and possibly by the Supreme Court.

Before this court we are here in what we may call an interlocutory injunction proceeding; in other words, to compel the respondents to quit doing what they are doing, which we think is an unfair labor practice, until such time as the Board has a chance to pass upon this case and determine whether or not the respondents are, in fact, committing [58] an unfair labor practice in violation of this statute. Whenever the Board issues its decision, if we obtain an injunction from the court, that injunction then expires, and then we may go to the Circuit Court of Appeals for whatever relief is needed, pending decision by the Supreme Court.

So the issue before this court is whether or not upon the investigations made by the Regional Director there is reasonable cause for him to believe, probable cause, or, reasonable cause is the way the statute is framed, that a violation of the Act has been committed as charged, and that a complaint should issue. Our position is that if this court agrees there is reasonable cause to believe that such a violation has been committed, then we are entitled to injunctive relief; that it is not for this court to determine the disputed questions of fact or even disputed questions of law, except in a very narrow sense, and that is whether or not the Regional Director has reasonable cause to believe, as I say, that a violation has been committed.

I want to call attention to that because since these proceedings are rather new, not only to us, but I am quite sure to the District Courts as well; we didn't have this sort of thing under the old National Labor Relations Act. It is something entirely new, set up by the so-called Taft-Hartley Act. [59]

The Court: Do you argue that this Act brings into play new principles of equity?

Mr. Manoli: No, your Honor, I do not say **that**, but I say that under the statute we are required, whenever the Regional Director has reasonable **cause** to believe that a violation has been committed, to come into a court of equity; that it is mandatory upon us to come in and ask for injunctive relief, and for that injunctive relief, we do not have to show, as we see it, irreparable harm, as is usually the case—as is the case in an equity proceeding. We are enjoined to show that only when we are asking for a temporary restraining order, and the language of the statute says—this is Section 10(1), your Honor:

“Whenever it is charged that any person has engaged in an unfair labor practice with the meaning of paragraph (4)(A), (B) or (C) of Section 8(b) the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any District Court [60] of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business,

for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter.”

Then the statute goes on to say:

“Provided Further, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period.”

We are not asking for a temporary restraining order. We are asking for what I have described as an interlocutory injunction, which will be good, if issued, until the Board decides the case, and we submit that since the statute makes no provision in an injunction proceeding of this kind for a showing of irreparable harm, that we do not have to show it. The statute says we have to make that showing only when we ask for a temporary restraining order. It makes no reference to a matter such as this, to an injunction such as [61] this.

The Court: What is the purpose of the interlocutory injunction?

Mr. Manoli: I think the purpose of it, your Honor, is to sort of undo, have certain things undone, until there is a legal determination by the Board,—until there is a determination with respect to the legal issues by the Board and ultimately by the Circuit Court of Appeals. It does involve a certain amount of duplication, I grant you, your Honor; that cases will be frequently heard before District Courts and at the same time before the Board, but that is the scheme of the statute.

The Court: That argument is tantamount to saying, is it not, that the act of an administrative officer *ex proprio vigore*, without any substantial basis, would be sufficient to put into operation a court of equity to issue an injunction?

Mr. Manoli: Not exactly that, your Honor. We would have to make a showing by testimony that the Regional Director does have reasonable cause to believe that a violation has been committed. I think it will come out in this particular case that there is very little dispute as to the facts, and the chances are that we will not have to put on any testimony. But let us assume that in the case there was an answer filed to the Board's petition denying the facts [62] or the allegations in the Board's petition. Then we would be compelled to bring in witnesses here showing the basis of the Regional Director's determination that he has reasonable cause to believe that a violation has been committed. I don't think that is quite as narrow an action as your Honor indicated in your question.

The court still does have the question of determining whether or not the regional director does have reasonable cause to believe that a violation has been committed. The Regional Director cannot simply come in and say, "I think a violation has been committed, and I want the court to issue an injunction." It is not quite that simple. We do have to show that upon the facts the Regional Director can properly entertain reasonable cause that a violation has been committed.

Now, as to the facts in this case I think I can say that there is little disagreement between the petitioner, on the one hand, and the respondents, on the other. The facts, briefly, are something like this: The union in this

case has a dispute with this Sealright Company, the charging party here, over terms of conditions of employment. The union has gone out on strike. So far as I know, the strike is perfectly lawful. Then the union has gone to the Express Company which handles the goods of Sealright, and it has also gone over to the Terminal which likewise handles certain [63] products of Sealright, and has established a picket line at these places so as to induce or persuade the employees of these two particular outfits that do business with Sealright not to handle the goods of Sealright. We do not assert that there has been any violence on the picket line, or that any threats have been made, any express threats have been made. The picketing I think can be termed peaceful picketing in the sense that there has been no violence on the picket line, no disturbance of any kind. Nevertheless, we feel that this sort of picketing is a violation of Section 8(b)(4)(A) of the Act. Congress in enacting Section 8(b)(4)(A) of the Act had, as legislative history of the Act shows, this in mind: it sought to localize industrial dispute between the employer immediately concerned and his employees and the labor organization which represented them. Congress was very much concerned over the fact that frequently unions who were involved in a dispute with employer A would seek to bring pressure to bear upon the employees of employer B, who did business with employer A, so as to, in turn, put pressure on employer B not to do business with employer A. Congress felt that sort of thing, and I think it has been frequently described as secondary boycott,—felt that sort of thing was inimical to the general welfare of the country, and it sought to put certain limitations upon it. One of the common ways

in which this sort of pressure is brought upon [64] the employees of an employer with whom the union has no dispute is, of course, the picket line.

There has been a great deal said about free speech, whether it is free speech, and as to what its character is. There are a great number of decisions by the Supreme Court, and I am not attempting to minimize the force of the decisions. They are hard to explain away, but I think the Ritter's Cafe case, decided in 1942, furnishes us with a basis for the argument that Congress may limit industrial conflict so that the conflict takes place only between the employer immediately concerned and his employees, and so as to prevent the unions from bringing pressure to bear upon the employees of another employer so that they will engage in a concerted refusal to handle the goods of the employer with whom the union is having the real dispute, and, therefore, force the second employer to cease doing business with that particular employer. The Ritter decision is not, of course, on the motion, but I think the maxim of the case furnishes us with a basis which justifies the upholding of the constitutionality of this section of the Act. In that case Ritter owned a restaurant, and he had contracted with one Plaster—it is very easy for me to remember his name—he had contracted with one Plaster to build another building for him. Plaster was having trouble with the Carpenters union because he would not employ union people on the [65] construction site. The union then began to picket Ritter's restaurant. The union had no trouble with Ritter over his restaurant, and Ritter's employees had no difficulty with their employer. The State of Texas brought proceedings against the union in that case—or, before I get to that, the union

then began, as I say, to picket Ritter's Restaurant, and proceedings were brought against the union under the Texas Antitrust Law, alleging that this sort of picketing, which was perfectly peaceful and no threats were being made, was contrary to the Texas Antitrust Law. In that case Mr. Justice Frankfurter in the opinion for the majority of the court said:

"It is true that by peaceful picketing workingmen communicate their grievances. As a means of communicating the facts of a labor dispute, peaceful picketing may be a phase of the constitutional right of free utterance. But recognition of peaceful picketing as an exercise of free speech does not imply that the states must be without power to confine the sphere of communication to that directly related to the dispute. Restriction of picketing to the area of the industry within which a labor dispute arises leaves open to the disputants other traditional modes of communication. To deny to the states the power to draw this [66] line is to write into the Constitution the notion that every instance of peaceful picketing—anywhere and under any circumstances—is necessarily a phase of the controversy which provoked the picketing. Such a view of the Due Process Clause would compel the state to allow the disputants in a particular industrial episode to conscript neutrals having no relation to either the dispute or the industry in which it arose.

"In forbidding such conscription of neutrals, in the circumstances of the case before us, Texas represents the prevailing, and probably the unanimous, policy of the states. We hold that the Constitution

does not forbid Texas to draw the line which has been drawn here. To hold otherwise would be to transmute vital constitutional liberties into doctrinaire dogma. We must be mindful that 'the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants.' " [67]

In this case we say that Congress in the exercise of its plenary power over commerce, which is like a State in the exercise of its police case, as in the Ritter case that Congress, in the exercise of their power, may draw this line and say that a labor organization or its agents shall not induce or encourage the employees of another employer to engage in a concerted refusal to handle goods where the purpose is to cause that employer to cease doing business with the employer with whom the union is having difficulties.

That, in substance, your Honor, is the position we take in this case. Congress has given a great deal of thought to this problem, has given a great deal of thought to the matter of the secondary boycott upon the general welfare of the nation, and has come to draw this line, and we think, under the principle enunciated in the Ritter case, Congress can properly draw that line.

Now, I would like to also quote, in connection with the Ritter case, from the case of *Stapleton v. Mitchell*,

as to which counsel for the union has already argued. That is in 60 Fed. Supp., page 51. I think the language in that case is helpful to a decision in this case. In that case Judge Murrah of the Tenth Circuit, speaking for a three-judge court said:

“As we have said, the process of self-organization, collective bargaining and all other [68] allied union activities necessarily involve the rights of free speech, press and assembly which may not be conditioned by statute or previous restraint by injunctive process, but we must also recognize that the sum total of all union activities are directed toward economic objectives and necessarily involve purely commercial activities which may be regulated in the public interest on any reasonable basis. In short, when used as an economic weapon in the field of industrial relations or as coercive technique, speech, press and assembly are subject to reasonable regulation in the public interest and in that respect the State is the primary judge of the need, and it is not required to wait until the danger to the community which it seeks to avoid is ‘clear and present.’ ”

There is one other point I want to cover before I am through here, and that is Section 8(c) of the Act. Section 8(c) of the Act provides that:

“The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, [69] if such expression contains no threat of reprisal or force or promise of benefit.”

That section of the Act must be read—or, perhaps the other way around. Section 8(b)(4)(A) reads:

“(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

“(4) To engage in or to induce or encourage the employees of any employer to engage in, a strike,”

and so on, and that must be read in conjunction with Section 8(c), because Section 8(c) says,

“The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act . . .”

We say, your Honor, that the picketing as being conducted in this case is more than an expression of views, or argument, or opinion. It is a coercive technique, and the Supreme Court has recognized that, I think, in the *Ritter* case, and it is also recognized in the quotation I just read from *Stapleton v. Mitchell*, and that is, where you have a coercive technique, it is not within the protections of Section 8(c) so as not to be an unfair labor practice because it is the expressing of views, argument, or opinion, or the dissemination [70] thereof. This picketing is something more than that, and for that reason we believe it comes within the prohibition of Section 8(b)(4)(A).

Counsel for the other side, in addition to their arguments on the basis of the First Amendment, have also sought to sustain their position on the basis of the Thir-

teenth Amendment, which prohibits involuntary servitude. I do not believe that that amendment is in this case at all, your Honor.

Section 8(b)(4) of the Act provides that it shall be an unfair labor practice for a labor organization or its agents to engage in various conduct. There is nothing in this act which makes it an unfair labor practice for an individual employee to quit. What is the unfair labor practice is something which is done by the labor organization or its agents. We are not asking in this case here for an order which compels the employees here to handle the goods of Sealright. That is their privilege. If they do not want to do so, they have a perfect right to follow that course. What we are asking for is an order to restrain the labor organization or its agents from inducing or persuading them to engage in a concerted refusal of this kind that has taken place in this case.

The Court: How would you frame that kind of an injunction? What would you say in the edict? [71]

Mr. Manoli: Well, your Honor, I must be frank and say that I haven't given a great deal of thought to the framing of the injunction as yet.

The Court: You have all the facts here. You say there is no dispute on the facts. What kind of an injunctive order would you hold should be made?

Mr. Manoli: I think you might perhaps enjoin them from engaging in this concerted picketing by threats of reprisal or by promises of benefits, and other like acts.

The Court: Those are simply the words of the statute.

Mr. Manoli: Yes, they are, your Honor.

The Court: You think those words are self-interpretive?

Mr. Manoli: I think that if we made it as specific as that we could not have too much trouble with understanding what is meant.

The Court: If that argument goes to its logical conclusion, doesn't it prohibit picketing?

Mr. Manoli: Does it prohibit picketing?

The Court: Yes.

Mr. Manoli: We think it does, your Honor, because we think by means of this picketing the union here is applying a coercive technique to persuade these employees in the Express Company and the Terminal to engage in a concerted refusal in the course of business to handle the products of Sealright, so that their employer, in turn, would be required [72] to cease doing business with Sealright.

Your Honor, I am sorry I wasn't aware of the rules of this court requiring the submitting of a memorandum in support of our position. I would like to have a few days so that I could do that. Would your Honor desire to set any time limit, or would by the end of this week be all right?

The Court: Yes, I think so.

Mr. Manoli: Thank you, your Honor.

Mr. Todd: Your Honor, please, counsel cites the *Stapleton v. Mitchell* case, and he cites the general language of the court to the effect that Congress, as a legislative body, has the right to limit or to regulate picketing. I can give him where the general language I refer to is used. What we are concerned with is whether or

not the Supreme Court has laid down the general rule. It says, "Yes, you have the general right, but here is what you cannot do, and here is what the legislative body can do." Then in *Stapleton v. Mitchell*, and this is Justice Murrah's statement we are concerned with, in 60 Fed Supp., page 56, column 1, and here is paragraph (3) of the statute that is before the court, which makes it unlawful for any person:

"(3) To participate in any strike, walk-out or cessation of work or continuation thereof without the same being authorized by a majority vote of the employees . . ." [73]

That is not what we are concerned with here, but that is one of the sections that is set out. Yes, now here is Section 12, where it is unlawful:

"(12) To refuse to handle, install, use, or work on particular materials or equipment and supplies because not produced, processed, or delivered by members of a labor organization; (13) to cause any cessation of work or interfere with the progress of work by reason of any jurisdictional dispute, grievance or disagreement between or within labor organizations; . . ."

"Jurisdictional,"—it is very similar to the situation we have here. And if you turn over then to page 62, it says:

"We conclude that subsections (3), (12) and (13) of Section 8 of the Act are unconstitutional and void on their face, and the defendants are enjoined from enforcing or giving effect thereto."

So we have the language of the Circuit Court telling legislative bodies exactly what they can and what they cannot do.

Counsel was very frank in saying that the purpose of this Act is to limit industrial disputes to an employer and his own employees. Now, let us see what the Supreme Court said. I cited this before, but it is worth reading again. Let us [74] see what the Supreme Court said in the *Angelos* case. That is, *Cafeteria Employees Union v. Angelos*, 320 U.S. 293, decided November 22, 1943, which was a year and a half after the *Ritter's Cafe* case. That was a case which involved the contention that the State of New York had a right to limit the area of an industrial dispute to an employer and his own employees, almost exactly what counsel said, almost his exact language. Now, let us see what the Supreme Court said at page 295 and 296:

" . . . The Court here, as in the *Swing* case, was probably led into error by assuming that if a controversy does not come within the scope of State legislation limiting the issue of injunctions, efforts to make known one side of an industrial controversy by peaceful means may be enjoined. But, as we have heretofore decided, a State cannot exclude workingmen in a particular industry from putting their case to the public in a peaceful way"—that is what our people are doing; they are putting their case to the public in a peaceful way—" 'by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him.' "

The Supreme Court says you cannot do it, the legislative [75] body cannot do it, and that is quoting from the language of the *Swing* case, 312 U.S. at 326. So we have the court in two cases within a period of two or three years using exactly the same language and saying that a legislative body cannot limit the area of industrial disputes to a circle including only one employer and his own employees.

I do not know whether it is necessary to go very deeply into counsel's argument. He says that "we do not claim violence or threats." In other words, I suppose he would say that he doesn't claim any promise of benefits either, so that the language of the immunizing statute does not apply here. He admits there wasn't any violence and threats, and probably admits there wasn't any promise of benefits. Therefore, what they are seeking to enjoin is picketing, which was upheld by the Supreme Court, certainly since April, 1940. And he says the picketing has coercive force. Of course it has. That is what picketing is. It is publicizing a dispute for the purpose of helping the union and helping to keep away business from the particular employer, and also to picket his product wherever it goes, because both in the *Wohl* case, the decision of the Supreme Court, and in the *Fortenbury* case, the decision of the Supreme Court of California, in which they cited the Supreme Court of New York, *Goldfinger v. Feintuch*, they hold that the only opportunity that the union has to publicize the dispute is by going where the product is [76] transported or is on sale.

Then, as I pointed out, they are trying to fly exactly in the face of the decisions of the Supreme Court with regard to limiting the area of an industrial dispute. There

is the Wohl case, as I pointed out to you, which was a unanimous decision. Let me look at the Angelos case and see whether that is also a unanimous decision. The Wohl case was. There is no dissenting opinion, apparently, in the Cafeteria Employees v. Angelos case, and they say in both cases that you cannot limit the dispute to an employer and his own employees.

Counsel says that the conditions which brought on the "hot cargo" Act,—for that matter, more or less says you must not have that. Now, I didn't go into a secondary boycott, except as here, boycotting a product which we contend is proper and a true secondary boycott. That is all.

Would your Honor allow us to reply to counsel's memorandum in writing?

The Court: Yes.

Mr. Todd: We thank you for your attention, and we would be glad to file the argument in a little more substantial way.

The Court: You may file your memorandum by Saturday of this week, Mr. Manoli, and then the other side will have—how many days do you want? Three or four days?

Mr. Todd: I imagine it will be rather a formidable [77] document. Could we have a week?

The Court: Any objection?

Mr. Manoli: No objection.

The Court: Very well.

Mr. Todd: Thank you.

The Court: Gentlemen, the court posed to counsel, and I don't know whether it was done in the presence of all of you or not, but the question was as to whether

this might not be a three-judge case, in view of the manner in which the argument has developed? Have you given that any thought at all?

Mr. Gilbert: Yes, we have, your Honor. All of the cases which we can find in which that particular section of the Judicial Code—I believe it is Section 266 to which I have reference—has been invoked have been cases in which a private party has sought injunctive relief against the enforcement of either a Federal or a State law.

In *Hague v. C.I.O.*, which is one case, that was action brought under the Civil Rights Act by a labor organization to enjoin the enforcement of a municipal ordinance. In *Stapleton v. Mitchell*, to which we have referred here, that was a case of seeking an injunction against the Kansas statute. There is a recent case, the title of which escapes me, but which is a decision, I believe, which counsel for the Board can perhaps enlighten us on, in which the validity of [78] Section 10(h) has been brought into play, the question of so-called loyalty affidavits, and there was an action to enjoin the Board from proceeding. I know of no case in which it holds that the enforcement of a purported statutory proceeding or statutory right by the governmental agency itself requires the three-judge court under that particular section.

Mr. Manoli: I didn't know that your Honor posed that question, but my understanding of the law is as Mr. Gilbert has stated it.

The Court: What was that case under Section 10(h)?

Mr. Manoli: I expect you are referring to the case in Texas?

Mr. Gilbert: That is right.

Mr. Manoli: That was a case with only one judge.

The Court: What was that case?

Mr. Manoli: That is the Oil Workers Union against—

The Court: You can cite it in your memorandum, if you will.

Mr. Manoli: Yes.

Mr. Todd: I was going to suggest that we might cover it in that memorandum. I am sure we all want to have it before the court that has the proper jurisdiction.

The Court: Very well.

[Endorsed]: Filed Apr. 7, 1948. Edmund L. Smith, Clerk. [79]

* * * * *

Los Angeles, California, Friday, February 13, 1948,

2:00 P. M.

The Clerk: No. 7859 Civil, Howard F. Lebaron, etc. vs. Printing Specialties and Paper Converters Union. Hearing settlement and entry of Findings of Fact and Conclusions of Law. George H. O'Brien for the Petitioner. Gilbert and Sapiro for the Respondents.

The Court: May I have the file? Gentlemen, I thought it well, in view of the objections filed by the Respondents, to advise all of you that this is the time fixed for the settlement of the Findings of Fact and Conclusions of Law, and Injunctive Relief, pursuant to order entered February 11, 1948. If there is anything further to add to what you have stated in your objections, I shall be glad to hear it.

Mr. Gilbert: On behalf of the Respondents, your Honor, I believe that we have nothing further to add. I would like to make one brief statement.

We have submitted to your Honor proposed Findings of Facts and particularly with reference to those proposed findings relating to the economic background of this dispute, from which the situation flowed. That is before this Court. It is our very conscientious desire to have the Court, if it will, and if it desires, make findings in respect to those matters, in order to have complete findings for the purpose of any appeal which might be taken upon constitutional [2] grounds.

With respect to the order for injunctive relief itself, as stated in the memorandum, I simply would like to reaffirm here orally today our conscientious desire to advise our clients, once the order is made, in such a fashion that they will be able to scrupulously observe the order of this Court; and it is for that reason we have urged upon the Court that the order should have such particularity that we will be able to accomplish that result.

Without in any way reflecting upon the merits of the situation, we frankly and most sincerely state to the Court that we find ourselves incapable of advising our clients as to the exact scope of an order couched in the language of the Act itself, because there is some confusion in our minds as to whether the dictionary definition of the language of this particular section of the Act is intended to apply, or whether there are any constructions or representations in that language. As I say, it is not raised in any way to reflect upon the merits, but we want to be in a position to advise our clients so they will scrupulously obey the order of this Court, and not

find themselves not hewing strictly to the line, according to the scope of this Court's injunctive relief.

Mr. O'Brien: With reference to the first point raised by Mr. Gilbert, on the economic background, I think that can [3] probably be covered by language substantially as follows, in the Findings of Fact:

"That on or about November 3, 1947, Local 388, having failed to reach an agreement with Sealright, caused a strike against Sealright."

On the second matter raised by Mr. Gilbert, as to the particularity of the order, I endeavored to follow the Court's instructions, or decision, by following strictly the language of the Act. I do suggest that to the following language, on line 16, page 5, of the proposed order, which reads:

"Engaging in, or inducing or encouraging. the employees of the employer"

that there be added the following words:

"by picketing, orders, force, threats, or promises of benefit, or by permitting any such to remain in force, or by any like or related acts or conduct"

then the text of the proposed order would resume as stated on line 17:

"to engage in, a strike or a concerted refusal in the course of their employment to use,"

I have had the final page of the proposed order retyped, and would like to submit it to counsel and to the Court.

The Court: You may do so. As to the first suggestion [4] that you made, where would you propose that that be incorporated into the findings?

Mr. O'Brien: If the Court please, that could be incorporated, and I think the proper place for it would be at the end of Findings Sixth, as a new Section 7, and Section Seventh and Section Eighth should thereafter be renumbered.

The Court: Will you read the first proposal, Mr. Dewing?

(Record read by the reporter.)

The Court: What is your reaction to that, Mr. Gilbert?

Mr. Gilbert: May it please the Court, particularly in view of the decisions of the Supreme Court of the United States with respect to picketing matters, I think it is clear that in almost every one of these cases the court has had before it, and properly should have before it, the factual situation giving rise to picketing activities.

We have submitted in our proposed findings of fact certain uncontroverted factual material drawn from the affidavit of Mr. Turner, which does give the background in this situation and the exact issues in dispute between the employer and his employees; the fact that the Union was a statutory bargaining representative of the employees; and the number of employees who joined in the strike; the relationship between the wages paid and the wages offered by this employer, and the prevailing standards established in the industry, and so on. [5]

I recognize that this Court may feel that such factual economic background would not in any respect alter its view of the validity of the legislation, and its view of the lawfulness or unlawfulness of the conduct of the Respondents. But I have in mind particularly such cases as Bakery and Pastry Drivers vs. Wohl, Carpenters and

Joiners Union of America vs. Ritters Cafe, and other cases we have cited in support of our position. In each of these instances at least the findings have indicated what the economic background of the labor dispute in question was.

In the present instance petitioner called no witnesses; filed no affidavits, through which this material might have been introduced. The sole material relating to it is the affidavit of one of the respondents, but an affidavit which in this particular is uncontroverted, and it is our feeling, in order that findings may be made on all of the matters of fact brought to the attention of the Court, that these proposed findings which we have suggested in Exhibit A attached to our memorandum of objections—I have particularly in mind the Sixth, Eighth, Ninth, Tenth and Eleventh of our proposed findings of fact—I believe that findings should be made with respect to all of those matters, and particularly since the affidavit with respect to them was not controverted in any respect by any counter affidavits or witnesses, by the Petitioner. [6]

I have in mind also, may it please the Court, the fact that the National Labor Relations Act of 1947 has a number of provisions dealing with and passing upon the legality of certain forms of contractual arrangements between employers and employees, such as the provision making unlawful the so-called closed shop; the provision establishing the requirement of a conduct of an election as a condition precedent to entering into an agreement, and the so-called Union shop restriction on welfare funds, restriction on Union dues, and so forth. We think it is important to have findings of fact on these particular situations which will show issues of fact according to the record here:

First of all, that the Respondent Union in this case was not in dispute with the employer on any issue of active bargaining, except wages and holidays, and that none of the demands of the Union in giving rise to this dispute would fall within the type of arrangement proscribed by the Labor Management Relations Act itself.

Second, that in view of the various decisions of the Supreme Court concerned with the matter of economic justification for certain strike and picketing activities on the part of labor organizations, concerned with whether or not the purpose of the picketing activity was in furtherance of the legitimate objective of the employees, I cite cases like *Dorchy v. Kansas*, for example; cases dealing with the [7] question of whether there is sufficient economic connection between the object of the picketing activities and the primary labor dispute, such as the *Ritter's Cafe* case, and also the *Wohl* case in which the Court discusses the subject matter of the dispute.

Therefore, we believe that it is material, and whether or not it would be considered to be material here, at least, in order that a full and proper presentation of the contentions of the Respondents may be made, in the event that an appeal should be taken in this case, that the findings to which I have alluded, concerning the economic background of the dispute, should be entered in this proceeding.

The Court: Do you want to say anything further, Mr. O'Brien?

Mr. O'Brien: If the Court please, Mr. Gilbert has repeated very much of the argument that we had here before, and insofar as there is any merit in it, that would be, I think, covered by the proposed new Finding Seventh which I suggested.

The Court: Of course, it would be just supererogation and unnecessary repetition for the Court to reiterate his views as they are incorporated in the opinion filed. The opinion, which has been denominated in the file as Memorandum of Ruling and Order Granting Injunction under Section 10(1) of the National Labor Relations Act, as amended, [8] contains some of the suggestions Mr. Gilbert has made, and I think that by having the findings recite the filing of that written opinion, any of the matters therein that are considered by a reviewing agency or tribunal to be material and relevant can be examined.

The Supreme Court of the United States, in the *Duplex* case, which is still the final pronouncement of the court of last resort on what has been characterized as "the secondary boycott," has spoken in no uncertain words, and until that tribunal, or some other applicable superior judicial body indicates otherwise, it is a binding pronouncement upon this Court, and it cannot be removed by argument, except such arguments as would lend support to the pronouncement of the Supreme Court of the United States.

In the decision in *Duplex Printing Press Co. v. Deering* 254 U. S. 443, which is cited in the memorandum,

and I am just enlarging upon that citation for the purpose of illustrating what is in the Court's mind, the Supreme Court says:

"The substance of the matters here complained of is an interference with complainant's interstate trade, intended to have coercive effect upon complainant, and produced by what is commonly known as a 'secondary boycott'; that is, a combination not merely to refrain from dealing with complainant, or to advise or by peaceful means persuade complainant's customers to refrain [9] ('primary boycott'), but to exercise coercive pressure upon such customers, actual or prospective, in order to cause them to withhold or withdraw patronage from complainant through fear of loss or damage to themselves should they deal with him.

"As we shall see, the recognized distinction between a primary and a secondary boycott is material to be considered upon the question of proper construction of the Clayton Act. But, in determining the right to an injunction under that and the Sherman Act, it is of minor consequence whether either kind of boycott is lawful or unlawful at common law or under the statutes of particular states. Those acts, passed in the exercise of the power of Congress to regulate commerce among the states are of paramount authority, and their prohibitions must be given full effect irrespective of whether the things prohibited are lawful or unlawful at common law or under local statutes."

The Court: In a very erudite and comprehensive work of the American Law Institute, Volume IV on Restatement of the Law of Torts, and particularly in the

section under Topic 7, Injunctive Relief, in labor disputes, we find some helpful suggestions.

Section 813, in black letter type, states:

"Injunctive Relief. [10]

"Subject to the limitations stated in Secs. 814-816, injunctive relief against wrongful concerted action by workers is appropriate under the rules applicable to injunctive relief against torts."

Section 814 of the same work, entitled, "Discretion in Injunctive Relief." In black letter type:

"Injunctive Relief against concerted action of workers under the rule stated in Sec. 813 is not demandable as of right. In determining whether such relief should be granted in a specific case the following factors are important:

- (a) the extent of the interests and the number of workers and employers directly or indirectly involved in the case.
- (b) the nature of the conduct sought to be enjoined;
- (c) the possible effects of the injunction on the labor dispute;
- (d) the existence and action of public tribunals empowered to act in the dispute by mediation, conciliation, arbitration, or command;
- (e) the problems of enforcement that the issuance of the injunction would create;
- (f) the adequacy of the hearings or testimony on the basis of which the injunction is sought;
- (g) the conduct of the plaintiff in the course of the labor dispute;

- (h) the detriment that the plaintiff is likely to suffer by conceding the object of the workers' concerted action."

Sec. 815 of the same work, entitled: Scope of Injunction. In black type:

"In framing an order enjoined concerted action by workers under the rule stated in Sec. 813, the following are important guides:

- (a) the order should enjoin only tortious conduct, except as stated in Sec. 816;
- (b) the order should be specific as practicable in describing the conduct enjoined and should avoid as far as possible question-begging or omnibus words or provisions;
- (c) the order should be written in simple language intelligible to workers without the aid of lawyers;
- (d) the order may describe generally or specifically the kind of conduct which it does not restrain; [12]
- (e) the order may impose restraints on the plaintiff as conditions of its restraints on the defendants."

Section 816, which is referred to in the first statement of 815, where in subdivision (a) it is stated that

"the order should enjoin only tortious conduct, except as stated in Sec. 816,

entitled Injunction Against Non-Tortious Conduct, says, in black type:

"A decree stated under the rule stated in Sec. 813 may enjoin non-tortious conduct connected with the enjoined tortious conduct, but only if,

- (a) it is clear from the past behavior of the defendants that, unless they are enjoined from engaging in the non-tortious conduct, they will continue the tortious and
- (b) the court finds that the non-tortious conduct should be enjoined under the rule stated in Sec. 814."

It seems to me that the court has appropriately covered, in its opinion filed in this case, the facts that are properly to be included in injunctive relief, and if the opinion becomes a part of the findings of fact by reference, I think any reviewing court will have before it precisely [13] what the views of this court were.

There are certain portions of the opinion which I think should be emphasized, with respect to the matters just discussed. On page 4 of the opinion, commencing with line 26, it is stated:

"In support of the motion the respondents filed simultaneously therewith an affidavit of Mr. Turner, recounting various steps that have occurred in a labor dispute relating to wage rates and holiday pay between the Union as a collective bargaining agency of the production employees of the Los Angeles plant of Sealright and such corporation which he avers culminated in a strike of 67 of the approximately 70 production workers in such local plant of Sealright on November 3, 1947.

"The only variance between the factual situation ascertained by the Regional Director of the Board and specified in his verified petition and that attested in the affidavit of Mr. Turner in his statement that the picketing at each of the described locales was 'peaceful.' "

Then the court proceeds to state that it has followed the rule of the Supreme Court in *Hecht Co. v. Bowles*, and has considered the evidence and weighed it, and, accordingly, has made its findings in view of the conclusions. [14]

It seems to be that Mr. Gilbert's suggestion as to the date of the strike is covered by that statement in the opinion, and we must assume that any reviewing court will examine the record, and if the record is examined the facts should be made clear as to what the views of the lower court were.

Is there any objection, Mr. Gilbert, to the incorporation of the oral suggestions that have been made by Mr. O'Brien?

Mr. Gilbert: May it please the Court, I do not believe that this last suggestion by Mr. O'Brien cures the defect in the original proposed order, that we believe exists.

We have suggested some of the problems, and while I believe that portions of the statements which the Court has read are applicable in cases for injunctive relief in disputes between picketing parties, I would certainly subscribe to the criteria there with respect to the scope of injunctive relief, with respect to specificity, and so forth. Some of the questions we have in mind, and which perhaps may be covered by one of the sections of the statement which the Court read, namely, that acts not sought to be enjoined are sometimes referred to in that fashion in order that it may be made perfectly plain, not only what is prohibited in the injunction, but what is permitted under its terms. And in many of these instances, in recent years, where a [15] labor situation has been involved, the order has excepted such conduct,

namely, picketing, which is not sought to be reached by the scope of the order.

I call the Court's attention to point IV of our memorandum of objections, which outlines some of the problems. It cannot be ascertained from this proposal, whether the continued existence of a picket line at or near the premises of Sealright Pacific, Ltd., would be restrained. This does clarify a portion of it with respect to the matter of dissemination of information by means of ordinary picketing, that is, pamphlets, radio or advertising and publications of general interest, and so on, to some extent, by including the terms "orders, force, threats, or promises of benefits." We have on previous occasions pointed out to the Court our confusion when these terms are put in the disjunctive, rather than the conjunctive, and we are by no means clear as to what constitutes a promise of benefits.

The language which we employ in stating this problem is on page 7 of our memorandum, inquiring whether it was intended by the original proposed order to prohibit respondents from publicizing the facts of the labor dispute in issue by expressing any views, arguments, or opinion, or the dissemination of the same in written, printed, graphic or visual form. Of course, we have reference to Section 8 (c) of the amended National Labor Relations Act, [16] declaring that such publication of views, argument or opinion should not constitute or be evidence of any unfair labor practice.

We have diligently and as carefully as possible, searched for guidance in that matter in the opinion on file, and we have attempted to read and reread that section in the light of the decision made herein; but we

are not exactly clear as to whether or not, for example, it is intended that the order should reach the matter of the picketing, irrespective of local, or pamphleteering, or other methods of the dissemination of the facts of the dispute coincident with peaceful picketing. Or whether or not it is proposed by this order to close the other media to the respondents, in addition to restraining picketing activities. And I do not believe that this proposal shows us the way out of that dilemma.

If I am permitted, I would like to make one additional comment with respect to the other matter. We have not conceded throughout this proceeding the position taken by the Petitioner, that this Court is limited in its discretion to the extent that the usual considerations which may be considered and passed upon by a court of equity in issuing, or declining to issue, injunctive relief are ruled out by Section 10 (1) of the amended Act.

We have felt, and we feel, that if that were the case then [17] that section of the Act would be subject to a further and additional objection, that it destroys the separation of powers under our Constitution, with respect to executive and judicial branches of Government, and in balancing the equity upon a situation of this kind we believe that findings with respect to economic justification, if there be any, for the concerted labor activity of these striking employees, is warranted, and that the findings should show whether or not the specific economic factors giving rise to the dispute were considered by the Court.

With respect to the portion of the opinion referred to, which would be incorporated by reference, many of these matters are contained therein that I have referred to in the proposed findings, but the specific issue

involved, that is to say, the contention, at least—I think the affidavit of Mr. Turner will support the contention of the respondent here—that this activity was justified by the desire of the respondent Union to maintain, and to picket the prevailing wage and holiday standards in this community, that the findings should show whether or not that was considered, and I do not believe that that portion of the opinion deals with the details of the relationship between the wages paid in this plant, and the wages paid in the community as the prevailing rate, and other economic issues involved. [18]

I am not arguing the merits, but I mention the case to show the point we are trying to get at. That is the case of *Dorchy v. Kansas*, and one of the situations the Court took into account was the objective of the activity; and we have attempted to point out,—and I won't attempt here to go into all of the details which are set forth in written form in the memorandum, unless the Court desires me to—but many of the matters which we have objected to were conceded by the Petitioner in its memorandum of points and authorities, wherein it restated the facts or restated the substance, in the same terms that we contend for at the present time. And I do believe that, in this particular situation, if possible, the exact nature of the dispute should be determined on the basis of the material presented.

There is one other matter that I would like to call the Court's attention to at this time. The statement in the opinion that the only variance between the factual situation is the question as to whether or not the activities were peaceful, might be amplified at least by consideration of subparagraph (c) of the Sixth proposed finding, appearing on page 3, at line 7 through 9.

In that connection I would like to call the attention of the Court to the matter set forth on page 3 of our memorandum of objections, being point 2, commencing on line 16, and the paragraphs following. First of all, I think [19] it is clear from the affidavit, and from the subsequent memoranda filed by the Petitioner, that a correction should be made with respect to the office held by the Respondent Turner in the Respondent Union.

The Court: You will observe in the opinion that the Court used the term "officers."

Mr. Gilbert: Yes, and I believe the Petitioner would concede that fact, that Mr. Turner is the secretary-treasurer of that organization, rather than the vice president, and the findings should so show.

Next I have particularly in mind that portion of the Sixth proposed finding, Sixth (c) that Mr. Turner allegedly advised L. A. Seattle that if it continued to handle Sealright's product, L. A. Seattle would be picketed by Local 388.

At the top of page 4 of our memorandum of objections we call the Court's attention to the fact that this allegation is specifically refuted by Mr. Turner's affidavit in the following words:

"At no time did affiant advise Los Angeles-Seattle Motor Express, Inc. that Local 388 would picket all or any of the firm's operations as such, if it continued to handle Sealright's products, nor did affiant in any way indicate or imply that Local 388 would picket any other products being handled or transported by said [20] firm for companies other than Sealright Pacific, Ltd., under any circumstances whatsoever."

Then following the filing of that affidavit, the petitioner, in his memorandum of points and authorities, stated the fact in these words:

“On about November 13, 1947 Respondent Turner, Secretary-Treasurer of Local 388, advised the Los Angeles-Seattle Motor Express, Inc. (hereinafter called L. A. Seattle), a common carrier which has transported Sealright's products, that if L. A. Seattle continued to handle Sealright's products, Local 388 would picket Sealright products handled by L. A. Seattle.”

The significance of this particular variation, I think is apparent. I would understand the view of this Court to be that a material boycott following the products of the struck plant, and picketing those boycotts, for the purpose of persuading employees of other employers, as a matter of individual conviction and view, to decline to handle or transport those products, that this situation I have just described, is a material boycott, and constitutes a secondary boycott within the meaning of the Duplex case, and as I understand the Court's views, the Duplex case, decided many years ago, is still relevant authority on that subject.

But I think that the Court would be willing to recognize the situation between a material boycott, and a [21] situation in which a Labor Union might advise a business firm, without reference to the presence of any goods or products of the struck firm at or near the premises; that is, if it would try to service, or do business with, or deal with the struck firm, saying, “We will attempt to induce your employees to go on a strike. We will attempt to induce the public not to do business with you. We will

place your firm on the "Do not patronize" list of the Central Labor Body.

I am not contending or arguing that this Court would make any distinction between the first situation I have described, and the second, as a matter of law, but I am contending that they are different situations, and all of the treatises and all of the articles on the subject of the law regarding boycott by members of striking labor organizations,—all of them recognize these are two different factual situations; and the precise issue which we believe was presented to this Court, is whether or not a material boycott,—the following of the products, and narrow conduct of picketing that product as such, without interference with any of the other operations of the business establishment handling those products,—whether that constitutes an unlawful secondary boycott which may be prohibited under 8 (b) (4) (A) and 10 (1) of the Act.

And it is for that reason we expressly request that [22] our proposed finding numbered Thirteenth, on page 3 of our Exhibit A of our memorandum, lines 17 through 23, be adopted as a finding of fact rather than the ambiguous statement in subparagraph (c) of the Petitioner's proposed findings of fact.

Mr. O'Brien: If it please the Court, I don't want to reargue this case at all. There are two things that I do want here. No. 1. I do want the Respondents to know specifically what they are prohibited from doing by the Court's order. I have endeavored to handle that matter as specifically as I could.

The second matter I hardly regard as material. That is, the precise definition of the findings of fact. The Court's memorandum opinion includes findings of fact

and conclusions of law, and the Federal Rules of Civil Procedure as they will certainly be amended, if they have not already been amended, will certainly include a provision that when the Court hands down an opinion that findings of fact and conclusions of law are incorporated.

I think that everything that was raised by Mr. Gilbert in his argument was fully covered in the Court's opinion, and it is my sincere belief that the retyped final page of the proposed order will sufficiently advise all of the Respondents of what action they are prohibited by the Court from taking.

The Court: Have you now before the Court the specific [23] and concrete suggestions that you make in that regard?

Mr. O'Brien: Yes, I have had the final page retyped, and the proposed order, as originally drawn reads, on line 16, page 5:

"Engage in, or inducing or encouraging, the employees of any employer"

It appears in exactly the same words as on the same line in the proposed correction. In the proposed correction, which the Court has before it are the words added on line 17:

"by picketing, orders, force, threats, or promises of benefit, or by permitting any such to remain in effect, or by any other like or related acts or conduct"

That concludes the proposed insertion ending on page 19. From there on the words

"engage in, a strike or a concerted refusal in the course of their employment"

are the same as line 17 in the original proposed order. From there on the order differs in no particular.

The Court: Do you want to say anything further, Mr. Gilbert?

Mr. Gilbert: If I might make a brief statement, and then I believe I will have presented to this Court, so far as I know at this time, all of the matters we are particularly [24] concerned about, and which we believe the latest proposals of the Petitioner do not meet.

As I read the amended proposals of the Petitioner with respect to the order granting injunctive relief, it is specifically not clear on the question I have raised, as to whether or not it is intended to prohibit picketing activities at or in the vicinity of the Los Angeles plant of Sealright Pacific Ltd. The charging part, in the case of where the National Labor Relations Board, states that the Respondent would be restrained and enjoined from engaging in

“a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, where an object thereof is forcing or requiring an employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the product of, or to cease doing business with, Sealright Pacific, Ltd.”

I am not clear from that language which I have just read as to whether it is intended to enjoin the Sealright

employees from engaging in a strike or concerted refusal to work at the plant of Sealright.

It is also not clear, reading that portion of the order [25] which would enjoin Respondents from inducing or encouraging the employees of any employer by picketing, to engage in a strike, and so forth,—whether or not that is intended to reach picketing at the Sealright plant.

For those reasons, at least, I believe it is certainly unclear.

With respect to the findings of fact, I want to make just one more point, in order that I might not have omitted calling it to the attention of the Court specifically. That is, with respect to the proposed findings contained in subparagraph (f) of the Sixth proposed finding of fact, relating to the loading of certain rolls of paper.

There has been a contention made here, and the facts have been adduced here by the Respondents relating to the ownership of that paper, and that matter is set out more fully in page 5 of our memorandum, lines 9 through 17, and the proposed finding is contained in our Exhibit A relating thereto, namely, that the paper was consigned from the New York plant to the Los Angeles plant of Sealright, for use in continued manufacturing operations. I certainly want to call that to the attention of the Court, and particularly our Sixteenth proposed finding of fact covering that matter.

And finally, we believe that the law itself is clear on the point. The order, as read, would run to all agents,

service, employees, and attorneys of the Respondent, whether [26] or not they had actual notice of the order itself, and we have, therefore, called this matter to the attention of the Court, both with respect to the Eighth conclusion of law and with respect to the order itself, suggesting that the language should be modified, or clarified, by the addition of the words: "who receive actual notice of the order by personal service or otherwise."

The Court: The Act has a provision which I think is adequate and sufficient on that point. In the final part of Section 10 (1) of the Act, as amended there is a proviso clause, which reads as follows:

"Provided further, That for the purpose of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which *it* duly authorized officers or agents"

I suppose that means "its," but the printed copy has no "t." I think it should read:

"in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where [27] such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8 (b) (4) (D)."

I want to say, not in amplification, but just in reiteration of what the Court said in its opinion, that which seems to have been lost sight of by counsel, quoting from page 6 of the ruling, commencing with line 5:

“Before turning to the very delicate constitutional issue that is involved under the established concrete factual situation before the Court, attention should be given to the significance and broad change in legislative policy that is definitely declared and clearly expressed by Congress relative to the use of injunctive processes available in the District Court to ameliorate the public interests in the federal area of labor disputes. Not only is it stated in Subsection (h) of Section 10 of the Act that the equitable jurisdiction of federal courts is no longer to be circumscribed by limitations specified in the Act approved March 23, 1932, 29 U.S.C.A., Section 101, et seq. (Norris-LaGuardia Act), but Subsection (1) of Section 10 further amplifies the National policy of utilizing appropriate judicial injunctive methods in the specific activities that are made unlawful in Section 8 (b), (4), (A) of the Act ‘notwithstanding any other [28] provision of law.’”

That is a clear line of demarcation, and when consideration is given to the other provisions of the amendments to the National Labor Relations Act, incorporated in the Labor-Management Act of 1947, as to the jurisdiction of the Circuit Court of Appeals, and of the administrative agencies, it is clear to this Court's mind, and it is obvious to the Court's mind, what Congress meant when it conferred the power of injunctive relief

upon the District Courts. So some of the able argument that has been made by counsel, I think, loses sight of that aspect of this regulation.

I am satisfied that the process should issue as it is requested. It is clear, explicit, and precise.

I want to say also I am hopeful that this suggestion that counsel make in their memorandum, that there is a denial on the part of the workers that they will not observe the injunction, is going to be respected; and I also hope that there will be an appeal in this case. I think it would have a tendency to clarify the situation.

If those two aspects of the case are pursued sincerely, I am confident that we will have accomplished something.

If you will present the modified finding, Mr. O'Brien, with the incorporation in it of the ruling of the Court, at the appropriate place, stating that the Court has made its ruling conform to the memorandum which is on file, [29] referring to it, and that all of it includes the enlargement I have spoken about, I think it will be sufficient. Do you want him to serve that on you, Mr. Gilbert, before it is presented to the Court for signature?

Mr. O'Brien: May it please the Court, the enlargement has already been typed, and was submitted to the Court as a substitute for the final page of the original suggested order. If it could be substituted and signed now, I would be happy to serve it upon Mr. Gilbert.

The Court: With the exception of the incorporation of the statement about the opinion of the Court. That is not included.

Mr. O'Brien: I shall do that.

The Court: Do you want it served on you, Mr. Gilbert?

Mr. Gilbert: I think it would be advisable.

[Endorsed]: Filed Apr. 7, 1948. Edmund L. Smith, Clerk. [30]

[Endorsed]: No. 11894. United States Circuit Court of Appeals for the Ninth Circuit. Printing Specialties and Paper Converters Union, Local 388, A. F. L., and Walter J. Turner, Appellants, vs. Howard F. LeBaron, Regional Director of the 21st Region of the National Labor Relations Board, on Behalf of the National Labor Relations Board, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed April 9, 1948.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the Circuit Court of Appeals of the United States
in and for the Ninth Circuit

No. 11894

PRINTING SPECIALTIES, LOCAL #388, etc.,
Appellants,

vs.

HOWARD F. LeBARON, etc.,
Appellees.

APPELLANTS' STATEMENT OF POINTS

The appellants state that the points upon which they intend to rely in the appeal in this action are as follows:

1. The District Court erred in denying the motion of appellants and respondents to dismiss the petition for an injunction under Section 10(1) of the National Labor Relations Act, as amended.

2. The District Court lacked jurisdiction over the instant proceeding, in that the entire matter was heard and decided under color of the purported authority of Sections 8(b)(4)(A) and 10(1) of the National Labor Relations Act as amended, which portions of said enactment are unconstitutional and void in that they contravene Amendments I, V, and XIII of the Constitution of the United States.

3. The Order for Injunctive Relief, from which this appeal is taken, restrains lawful acts of the appellants and respondents and in substance and in form, is contrary to

the Constitution of the United States, Amendments I, V, and XIII.

4. The District Court erred by failing to give any force or effect to Section 8(c) of the National Labor Relations Act, as amended, in deciding the merits of the instant petition.

5. Section 10(1) of the National Labor Relations Act as amended, and the Order for Injunctive Relief issued herein, are violative of Article III of the Constitution of the United States, in that non-judicial powers may not be conferred by Congress upon the inferior Courts nor validly exercised by said Courts.

6. The Findings of Fact, upon which the Order for Injunctive Relief is based, are contrary to and unsupported by the evidence, and omit material, uncontroverted facts established by the record herein.

7. The Findings of Fact, Conclusions of Law and Order herein are subject to the objections raised by appellant and respondents prior to the Settlement and Entry thereof, which objections erroneously were disregarded by the District Court.

Dated: April 16, 1948.

ROBERT W. GILBERT

ALLAN L. SAPIRO

CLARENCE E. TODD

By Allan L. Sapiro

Attorneys for Appellants

[Endorsed]: Filed Apr. 21, 1948. Paul P. O'Brien,
Clerk.

No. 11,894

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

PRINTING SPECIALTIES AND PAPER CON-
VERTERS UNION, LOCAL 388, A.F.L.,
and WALTER J. TURNER,

Appellants,

VS.

HOWARD F. LEBARON, Regional Director
of the 21st Region of the National
Labor Relations Board, on behalf of
the National Labor Relations Board,

Appellee.

Upon Appeal from the District Court of the United States for the
Southern District of California, Central Division.

OPENING BRIEF OF APPELLANTS.

ROBERT W. GILBERT,

117 West Ninth Street, Los Angeles 15, California,

CLARENCE E. TODD,

625 Market Street, San Francisco 5, California,

ALLAN L. SAPIRO,

117 West Ninth Street, Los Angeles 15, California,

Attorneys for Appellants.

JUL 16 1948

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No. 11,894

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PRINTING SPECIALTIES AND PAPER CONVERTERS UNION, LOCAL 388, A.F.L.,
and WALTER J. TURNER,

Appellants,

VS.

HOWARD F. LEBARON, Regional Director
of the 21st Region of the National
Labor Relations Board, on behalf of
the National Labor Relations Board,

Appellee.

Upon Appeal from the District Court of the United States for the
Southern District of California, Central Division.

OPENING BRIEF OF APPELLANTS.

MEMORANDUM OPINION BELOW.

The "Memorandum of Ruling and Order Granting Injunction under Section 10(1) of the National Labor Relations Act, as Amended" of the District Court of the United States for the Southern District of California, Central Division (R. 101-112)* is reported under the name of *LeBaron, etc. v. Printing Specialties and Paper Converters Union, etc., et al.*, 75 F. Supp. 678.

*All references are to the printed transcript of record.

JURISDICTION AND STATUTE INVOLVED.

The jurisdiction of this Court is invoked under Section 129 of the Judicial Code, as amended, 28 U.S.C.A. §227, page 379.

Pertinent provisions of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947, Public Law 101, 80th Cong., Ch. 120, 1st Sess. (popularly referred to as the "Taft-Hartley Act") are as follows:

Section 8(b)(4)(A).

"It shall be an unfair labor practice for a labor organization or its agents—

"to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is:

"forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * *"

Section 8(c).

"The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

Section 10(1).

“Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 8(b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States * * * within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: * * * Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge of such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further*, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee

members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit * * *"

Section 16.

"If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby."

STATEMENT OF THE CASE.

This appeal arises out of the prohibition of peaceful picketing of the products of a struck concern in the course of a bona fide labor dispute and lawful strike over wages and holiday pay by means of an injunctive order of the District Court under color of authority of Section 10(1) of the amended National Labor Relations Act.

Printing Specialties and Paper Converters Union, Local 388, appellant herein, is a subordinate union of the International Printing Pressmen and Assistants' Union of North America, affiliated with the American Federation of Labor. Local 388 includes within its membership approximately 1,800 employees of the paper conversion and allied industries in the City of Los Angeles and nearby communities. The Union membership is covered by numerous collective bargaining agreements with employers engaged in the

manufacture, distribution and sale of a variety of paper products. (R. 20.)

By the terms of said agreements, contracted during the twelve months period immediately prior to the commencement of this action, 1,500 members of the union were assured of a prevailing scale of minimum wages ranging from \$1.20 to \$1.33½ per hour for the lowest-skilled male job classifications and from \$1.10 to \$1.22½ per hour for the lowest-skilled female job classifications, with progressively higher rates for skilled job classifications. (R. 20-21.) These 1,500 union members also received six paid holidays annually under said agreements. (R. 21.)

Sealright Pacific, Ltd., the charging party, is a corporation engaged in the manufacture, sale and distribution of paper food containers and milk bottle caps in Los Angeles. (R. 29, 101, 135.) It recognized Local 388 as the exclusive bargaining agent of its production employees at the Los Angeles plant in September, 1941. Each year thereafter, from 1941 to 1946, collective bargaining agreements were negotiated and executed between Sealright and Local 388 through negotiations, and without any strike or other interruption of work. (R. 21.)

On August 16, 1947, Local 388 gave notice to Sealright of proposed modifications in the latest union agreement which had an anniversary date of October 16, 1947. Said 60-days' notice of reopening was given in accordance with the terms of the contract, and in accordance with the procedure contemplated by Sec-

tion 8(d)(1) of the amended National Labor Relations Act. (R. 21-22.)

Between August 16, 1947 and October 29, 1947, approximately eleven meetings were held between representatives of Local 388 and officers of Sealright for the purpose of negotiating a new labor contract, during the course of which meetings mutual consent was arrived at between the two parties as to all terms of a new collective bargaining agreement except wage rates and holiday pay. (R. 22-23, 105.)

On September 15, 1947, in compliance with Section 8(d)(3) of the amended National Labor Relations Act, Local 388 notified the Federal Mediation and Conciliation Service and the California State Department of Industrial Relations that a dispute existed. (R. 22.) After the required 30-day waiting period had expired, Sealright having rejected a compromise proposal offered by the union, and having refused to meet the established industry standards for wages and holidays, Local 388 called a lawful strike of its members against Sealright. (R. 22-23.)

The final offer of Sealright prior to the instituting of the strike would have provided the employees with three (3) paid holidays as against the prevailing standard of six (6) holidays, and fell between 17c to 23½c per hour below the prevailing male base rate, and between 22½c to 29½c per hour below the prevailing female base rate. (R. 22-23.)

At the time the strike was instituted, all of the approximately seventy (70) production employees of the

Los Angeles plant of Sealright were members in good standing of Local 388, and all but three (3) of said employees joined in said strike against their employer. (R. 23, 106.)

Peaceful picket lines were established by striking members of Local 388 in front of or near the entrances to the struck plant upon the occasion of the commencement of the strike. (R. 23-24.) (Appellee has made no contention that said strike and picket lines in the vicinity of the struck plant were in any respect unlawful.)

On or about November 14, 1947, members of Local 388 on strike at Sealright Pacific, Ltd. formed a picket line around two trucks loaded with Sealright's products at the local terminal of the Los Angeles-Seattle Motor Express, Inc. The strikers informed the trucking concern's employees that the Sealright products were manufactured under strike conditions and for substandard wages, and requested them not to handle the products. After November 14, 1947, the employees of the trucking concern refused to transport or handle Sealright goods. (R. 24-25; cf. R. 136-137.) The only evidence relating to the character of these picketing activities shows that they were peaceful, and "at no time did any officer, agent, representative, or member of Local 388 order, force, threaten any reprisal against or promise any specific benefit to any employee of the Los Angeles-Seattle Motor Express, Inc." (R. 24-25; cf. R. 104, 136.)

At about the same time, according to the record herein, Appellant Walter J. Turner, Secretary-

Treasurer of Local 388, advised one Mr. Lacey, manager of the Los Angeles-Seattle Motor Express, Inc. that the union was engaged in a strike due to a wage dispute with Sealright, and that members of Local 388 intended to picket Sealright's products manufactured under strike conditions and at substandard wages for the purpose of publicizing the dispute and soliciting the assistance of other workers asking that they decline to handle this merchandise. (R. 24; cf. R. 103, 136.)

The uncontradicted affidavit filed herein by Appellant Turner specifically denies that he ever advised Los Angeles-Seattle Motor Express, Inc. that Local 388 would picket all or any of that firm's operations as such, if it continued to handle Sealright's products, and furthermore denies that he ever in any way indicated or implied that Local 388 would picket any other products being handled or transported by that firm for companies other than Sealright under any circumstances whatsoever. (R. 24.)

On November 17, 1947, and for several days thereafter, striking members of Local 388 picketed Sealright products being loaded onto three freight cars by employees of the West Coast Terminals Co., which products were rolls of paper consigned from the New York plant to the Los Angeles plant of Sealright Pacific, Ltd. for use in manufacturing operations under strike conditions. The three freight cars in question were located on a siding alongside a West Coast warehouse at Terminal Island, Long Beach, California, and the picket lines did not pass in front

of the door of the warehouse or otherwise interfere with the normal operations of the West Coast Terminals Co. not involving Sealright products. Whenever during such picketing, it was necessary for the West Coast Terminals Company to move these three box cars in order to move other cars on to or remove other cars from the siding, the striking members of Local 388 temporarily discontinued their picketing activities and did not in any way interfere with the moving of the three box cars in question incidental to these operations. Subsequent to November 17, 1947, the employees of West Coast refused to handle or work on goods consigned to Sealright.

Here again, the only evidence relating to the character of these picketing activities shows that they were peaceful, and "At no time in connection with the peaceful picketing of said Sealright products alongside the warehouse of the West Coast Terminals Company did any officer, agent, representative or member of Local 388 order, force, threaten any reprisal against or promise any specific benefit to any employee of said firm." (R. 25-26; cf. R. 104-105, 137.)

On or about November 18, 1947, Sealright Pacific, Ltd. filed a charge with the National Labor Relations Board alleging that Local 388 had engaged in and was engaging in unfair labor practices contrary to Section 8(b)(4)(A) of the amended National Labor Relations Act by means of threats of picketing allegedly communicated to Los Angeles-Seattle Motor Express, Inc., and picketing at the West Coast Terminals Com-

pany docks in Terminal Island. (R. 27-30, 101-102, 135.)

After investigating the charge, Appellee LeBaron, who is the Regional Director of the 21st Region of the National Labor Relations Board, filed a document with the District Court entitled "Petition for an Injunction under Section 10(1) of the National Labor Relations Act, as Amended." (R. 2-8; 102; 134.) This document, which the District Court refers to as a "verified petition" (R. 102, 134), is completely devoid of any allegations of fact relating to the activities herein complained of. The sole allegation relating to the acts of the respondents and appellants is a legal conclusion that "' * * * Petitioner has reason to believe and believes that respondents and each of them have engaged in and are engaging in conduct in violation of Section 8(b), subsection 4(A) of the Act, within the meaning of Section 2(6) and (7) of the Act as follows", coupled with six subparagraphs lettered "a" to "f" enumerating the factual matter which the appellee alleges he "has reason to believe and believes." (R. 4-6.) Attached to the petition as "Exhibit 1," is a copy of the charge referred to above, which merely alleges threats of picketing and picketing by Local 388. (R. 27-30.)

Appellee filed no affidavits and presented no witnesses in support of his petition. (R. 152-153.)

Upon return of the order to show cause issued upon motion of the appellee (R. 8-10), appellants interposed a motion to dismiss the petition for injunctive

relief under Section 10(1) of the amended National Labor Relations Act for lack of jurisdiction, on the ground that the invoked sections, 8(b)(4)(A) and 10(1) as well as the relief sought are violative of Amendments I, V, and XIII of the Constitution of the United States. (R. 10-19.) The motion was supported by an affidavit of Appellant Turner, which represents the only direct evidence relating to the factual situation involved herein in the entire record. (R. 20-26.)

Following the submission of memoranda of points and authorities by both parties (R. 12-19, 31-50, 51-79, 82-96, 97-101) and the receipt of oral argument (R. 154-217), the District Court issued its "Memorandum of Ruling and Order Granting Injunction under Section 10(1) of the National Labor Relations Act as Amended" on February 3, 1948 (R. 101-112; reported at 75 F. Supp. 678), and, over the written (R. 120-127) and oral (R. 217-241) objections of counsel for appellants, on February 16, 1948 made its findings of fact and conclusions of law and order for injunctive relief, together with the dismissal of appellants' motion to dismiss. (R. 134-140.)

The order appealed from enjoins and restrains appellants "pending the final adjudication by the Board of this matter" from:

"Engaging in, or inducing or encouraging the employees of any employer, *by picketing*, orders, force, threats or promises of benefit, *or by any other like or related acts or conduct* to engage in, a strike or a concerted refusal in the course of

their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities, or to perform any services where an object thereof is forcing or requiring any employer or other person to cease using, selling, handling, transporting or otherwise dealing in the products of, or to cease doing business with Sealright Pacific, Ltd.” (R. 142.)*

GENERAL COMMENT ON THE ISSUES.

Whatever may be the propriety of commenting in such fashion upon pending litigation before the National Labor Relations Board and the Courts, both the Joint Congressional Committee on Labor-Management Relations and the General Counsel of the Board have stated rather fully and publicly their views concerning the issues raised by this case.

The *Joint Committee on Labor-Management Relations*, established pursuant to Section 401 of the so-called “Taft-Hartley Act” (Public Law 101, 80th Cong. Ch. 120, 1st Sess.) filed its first report with the Senate and House of Representatives on March 15, 1948. (Senate Report No. 986, 80th Cong., 2d Sess.). This report says in part:

“A total of 132 charges alleging secondary boycotts under the act were filed between August 22, 1947, and February 1, 1948. During such period

*Unless otherwise indicated, all emphasis in quotations indicated by italics has been supplied.

the Board filed petitions for injunctions pursuant to Section 10(1) in 9 of the 132 cases * * *

“In the most recent case the Board’s petition was granted by the United States District Court for the Southern District of California. Local 388 of the Printing Specialties and Paper Converters Union, A. F. of L., had called a strike of the employees of Sealright Pacific, Ltd., over wage rates and holiday pay * * *

“The Board charged that the action of Local 388 in inducing the employees of the [Los Angeles-Seattle] Motor Express and West Coast Terminals Cos. not to handle Sealright’s goods constituted a secondary boycott prohibited by the act. The court found the union’s defense, that the act’s provisions violated amendments 1, 5, and 13 of the Constitution, was without merit, and on February 3, 1948 granted the requested injunction pending consideration of the case on its merits by the Board. (*LeBaron v. Printing Specialties and Paper Converters Union, Local 388, AFL, et al.*, 21 L.R.R.M. 2268, F. Supp.) * * *

“It is anticipated that tests will be made in the Supreme Court on the constitutionality of the new act’s restrictions on secondary boycotts * * * Unions may be expected to seek such a test in *a case where the only act complained of is peaceful picketing* in support of a secondary boycott, contending that such conduct is *an exercise of their constitutional right of free speech*. Such argument has been made and rejected by a lower court in granting a temporary restraining order. *This committee will continue its study of these cases in the interest of being prepared to offer*

remedial legislation should defects in the present provisions become apparent."

(Senate Report No. 986, 80th Cong. 2d Sess., pp. 16-19.)

Similarly, *the General Counsel of the National Labor Relations Board* has disseminated his views concerning the instant case in the form of remarks made to a Conference of Circuit and District Judges of the Fifth Judicial Circuit at New Orleans, Louisiana on June 4, 1948. (Board Press Release R-87.)

In this speech, the general counsel declared:

"The mandatory injunctive proceedings brought under Section 10(1) involved alleged violations of Section 8(b)(4)(A), the secondary boycott provision, in almost all of which *the protection of Section 8(c), the 'Free Speech' provision has been claimed.* In none of these cases has the Board handed down its decision, but in several, the Trial Examiners have issued their intermediate reports. A comparison of the treatment by the courts and the Examiners is worthwhile:

* * * * *

"The main attacks on this provision have been that it violates the First, Fifth, and Thirteenth Amendments. In every instance these attacks have been overruled by the District Courts. (*LeBaron v. Printing Specialties Union*, 75 F. Supp. 678 (S. D. Calif.); * * *) There can be no serious quarrel with these rulings * * *

"The issue, if there is one, seems to lie in the interpretation of the words, 'induce or encourage'. Do they forbid inducement or encourage-

ment by mere persuasion? Does peaceful picketing fall within the prohibition? In the *Thornhill* and *Carlson* cases (*Thornhill v. Alabama*, 319 U. S. 88 (1940); *Carlson v. California*, 310 U. S. 106 (1940).), the Supreme Court has classified peaceful picketing as protected free speech. Whether it will do so under this statute remains to be seen, but meanwhile there is no question that picketing, though peaceful, loses its constitutional protection when indulged in pursuit of an illegal objective, or in an industry unrelated to the controversy. The *Ritter's Cafe* case, (*Brotherhood of Carpenters v. Ritter's Cafe*, 315 U. S. 722 (1942).) * * * seems to have settled that. And in view of the *Duplex Deering* and *Bedford Stone Cutters* cases decided about 25 years ago, there should be no doubt that peaceful picketing in pursuit of a secondary strike or boycott does not enjoy constitutional protection.

"Doubt has arisen, however, because of several cases decided by the Supreme Court between 1941 and 1943, which reversed as *contrary to the First Amendment*, *State Court decrees enjoining peaceful picketing by strangers to the picketed establishment*, because in the State Court's opinion there could be no labor dispute between an employer and strangers to his employ. (*A. F. L. v. Swing*, 312 U. S. 321 (1941); *Bakery Drivers Union v. Wohl*, 315 U. S. 769 (1942); *Cafeteria Employees v. Angelos*, 320 U. S. 293 (1943).)

"These cases have been heavily relied upon by the unions in several of the injunction cases, as establishing the right of labor organizations under the Free Speech amendment, to peacefully picket

employers with whom they have no direct dispute, but who deal in the products of an employer with whom they have such dispute, and, thereby as supporting their *contention that Section 8(b)(4) (A) is unconstitutional insofar as it is construed to forbid such picketing* * * *

*"The question has been squarely raised in three cases, two against the Carpenters Union * * * and the third against the AFL Printing Specialties Union, involving a paper container company in Los Angeles. (LeBaron v. Printing Specialties Union (Sealright Pacific, Ltd.), 75 F. Supp. 678 (S. D. Calif.))* * * *

*"The General Counsel's office agrees with the District Courts which * * * not only overruled the contention that such picketing was protected by the First Amendment, but also overruled the contention that it was protected by Section 8(c) of the Act.*

"The Trial Examiners' treatment of the questions has been generally more detailed in the three cases I have just noted. In accordance with Board doctrine, they assume the constitutionality of the challenged provisions of the statute, and merely considered the contention that the conduct was immune under the statute itself * * *

*"In * * * two cases, the Trial Examiners both assumed a general premise: First, that the immunity granted under Section 8(c) to non-threatening expressions of views applies to the exercise of speech by labor organizations, as well as by employers—a proposition supported by the language of the provision and its legislative history; and, second, that peaceful picketing is an expression of views, argument, or opinion within the*

meaning of Section 8(c), and unless it contains threats or is attended by circumstances making it the equivalent of a threat, it enjoys the immunity of Section 8(c).

“* * * the Trial Examiner in the *Los Angeles* case (*Matter of Printing Specialties Union (A.F.L.) and Sealright Pacific, Ltd.*, Case No. 21-CC-13 (May 4, 1948) concluded that peaceful picketing had no such threatening significance in respect to employees who were not members of the respondent union, or of a union associated in picketing with the respondent union, and, in such a case, was protected by Section 8(c) * * *

“Where the Trial Examiners part company with the General Counsel is upon the question of whether, in the light of present day realities, a picket sign of a union, whether one to which an employee belongs or not, is not such as to put the employee in fear of his standing with his own union, or his fellow members, or his fellow workers, as the case may be, so as, in effect, to coerce his will. Or a promise of benefit that ‘If you don’t cross my picket line, I’ll not cross yours.’
* * *

“That question, as well as other choice issues which time does not permit me now to go into, is still to be passed upon by the Board, and ultimately, the reviewing courts.”

(National Labor Relations Board Press Release R-87, pp. 21-26.)

As will be amplified by the argument set out below, appellants contend that if the interpretation of the legislation contended for by the general counsel is

to be deemed correct, then Section 8(b)(4)(A) is contrary to the First, Fifth, and Thirteenth Amendments, and the District Court lacked jurisdiction to proceed under Section 10(1). On the other hand, if Section 8(c) protects peaceful picketing of the products of a struck plant under the circumstances of this case then the fact of such picketing cannot "constitute or be evidence of an unfair labor practice" in a proceeding under Section 10(1), and the petition herein should have been dismissed by the District Court for that reason.

SPECIFICATION OF ERRORS TO BE URGED.

The Court below erred:

1. In holding that Congress clearly has power under the Constitution to enact the provisions of the amended National Labor Relations Act here in question;

2. In holding that "the provisions of the Labor Management Relations Act, 1947, here under attack are valid congressional legislation and are not unconstitutional";

3. In holding that the provisions of the amended Act here in question do not infringe upon the freedom of speech and assembly guaranteed to all by the due process clause of the Fifth Amendment and by the First Amendment to the Constitution;

4. In holding that Congress has in Section 8(b)(4)(A) of the amended Act "kept within the permis-

sive restrictions on free speech and assembly that have been approved by the Supreme Court in comparable legislation”;

5. In holding that an object of the picketing activities here involved was “the type of coercion that is attended with serious repercussions and dire consequences upon the interests of the two strangers to the labor dispute between Sealright and the Union”;

6. In holding that such picketing activities are a “form of forcible technique” which is “subject to restrictive regulation by the State in the public interest on any *reasonable basis*.”

7. In holding that the prohibition against involuntary servitude in the Thirteenth Amendment to the Constitution of the United States and the guarantee of liberty set forth in the Fifth Amendment have not been contravened by any of the provisions of the amended Act here in question;

8. In holding that the inherent and statutory rights of employees as such are preserved by “saving provisions” in Section 502 of the Labor Management Relations Act, 1947;

9. In holding that Section 8(b)(4)(A) of the amended National Labor Relations Act is not unconstitutionally vague or indefinite;

10. In failing to give any force or effect whatsoever to Section 8(c) of the amended Act in deciding the merits of the instant petition for injunctive relief;

11. In making the Injunctive Order from which this appeal has been taken, restraining in vague and

indefinite terms lawful acts of the appellants, and thereby contravening the Constitution of the United States, Amendments I, V and XIII;

12. In exercising non-judicial powers by the issuance of said Order for Injunctive Relief contrary to Article III of the Constitution of the United States;

13. In holding that "under the unequivocal procedural mandates incorporated in the Act" the District Court is compelled to accept as true the Regional Director's allegation in the petition that he has "reasonable cause" for believing that an unfair labor practice as defined in Section 8(b)(4)(A) has occurred, without requiring the introduction of any evidence in support of said conclusion of law;

14. In holding that the District Court under Section 10(1) of the amended Act is required to, and may constitutionally "grant an appropriate injunction auxiliary to the proceedings in the Board";

15. In adopting the purported factual matter which appellee merely alleges he has "reason to believe and believes" in his petition almost *in haec verba* as a part of the Court's "Memorandum" opinion and Findings of Fact, to the exclusion of the uncontroverted facts set forth in the affidavit of Appellant Turner filed in response to the order to show cause herein;

16. In holding that the District Court had jurisdiction of the proceedings below and of appellants and possessed power to grant injunctive relief under Section 10(1) of the amended Act;

17. In holding that there is reasonable cause to believe that appellants have engaged in "unfair labor practices" within the meaning of Section 8(b)(4)(A) of the amended Act;

18. In adopting the Findings of Fact herein, which findings are contrary to and unsupported by the evidence, and omit material uncontroverted facts established by the record;

19. In adopting the Conclusions of Law herein, which conclusions are contrary to law;

20. In disregarding appellants' objections to said Findings of Fact, Conclusions of Law, and Injunctive Order herein, which objections were raised prior to the Settlement and Entry thereof;

21. In denying "in toto" appellants' Motion to Dismiss the Petition for Injunctive Relief, and refusing to dismiss said petition.

SUMMARY OF ARGUMENT.

I.

Members of labor organizations as well as other persons are constitutionally guaranteed the right to express themselves on matters of public concern without being subject to prior restraint. Denial of the right of working men to peacefully and effectively publicize the existence of a labor dispute with the purpose of persuading others to voluntarily refrain from aiding the employer party to such dispute

abridges the cognate rights of free speech and assembly embodied in the First Amendment and amounts to a denial of liberty without due process of law in contravention of the Fifth Amendment.

II.

The power of Congress to enact legislation for the general regulation of industrial relations affecting commerce is strictly limited by the provisions of the Bill of Rights.

Peacefully picketing and threatening to peacefully picket the products of an employer with whom a bona fide labor dispute is pending and against whom a lawful strike has commenced definitely comes within the constitutional safeguards of free speech.

III.

Section 8(b)(4)(A) of the Act in question cannot validly be applied to restrain peaceful picketing pursuant to a "product boycott". Said section must be held to be invalid on its face, unless peaceful picketing under the circumstances of this case is deemed excluded from its terms by the immunizing language of the "free speech proviso" of Section 8(c).

The usual presumption of constitutionality afforded legislative enactments may not be invoked in proceedings involving an attempted abridgment of free speech. Fundamental personal rights enjoy precedence not accorded to property rights and are susceptible of restriction only to prevent grave and impending public danger.

Section 8(b)(4)(A) is void for vagueness and uncertainty.

IV.

The application of Section 10(1) and the order of the District Court herein violate the inhibition of the Thirteenth Amendment against involuntary servitude.

The ancillary functions of the District Court under Section 10(1) in aid of the National Labor Relations Board's administrative duties violate Article III of the Federal Constitution.

V.

The findings of fact specified as error herein are contrary to and unsupported by the evidence, and omit material, uncontroverted facts established by the record.

ARGUMENT.

I.

THIS CASE INVOLVES ATTEMPTED OVERRIDING BY A STATUTE OF SPECIFIC AND FUNDAMENTAL CONSTITUTIONAL PROHIBITIONS.

In discussing the constitutional aspects of the case before us, we first wish to compliment the District judge who, in his Memorandum Opinion (R. 105-112) has set forth the very strongest arguments which could be advanced in support of abridgment of the right of free speech under the terms of the Taft-Hartley Act. As we shall show, we disagree categorically with the learned judge's conclusions, with the arguments in

support thereof, and with his interpretation of the authorities which he mentions.

At page 107 of the record, the District Court referred to the "very delicate constitutional issue" involved in the case, which language is immediately followed by a reference to the "significant and broad change in legislative policy" expressed in the Taft-Hartley Act. Later in his opinion, the Court characterizes the peaceful picketing shown by the pleadings and the evidence to have been carried on as "forceful technique" and "coercive" as to third parties (R. 110, 111).

Now, let us look at the constitutional picture generally. There is not a word in the evidence as to any language or acts of the pickets even remotely suggesting violence, threat of violence, forcible obstruction of ingress or egress, or any form of breach of the peace (See Point XI *infra*). Therefore we have a decision by the judge, from which this appeal is taken, that the mere walking up and down by a picket in a peaceful manner in the attempt to persuade those dealing with a struck employer to cease their dealings is in itself "coercive" and not the "dissemination of information" referred to in the *Thornhill* (310 U. S. at p. 88) and subsequent cases.

Previously this type of patrolling for precisely this purpose was held to be a constitutional right in April, 1940, by the decision in the *Thornhill* case. The Court does not question the validity of the *Thornhill* case, but he claims that those acts which were lawful and constitutional in 1940 are unlawful in 1948.

The judge claims, in effect, that these acts of free speech by the pickets constituted "an incitement". Now in 1925, in the *Gitlow* case (*Gitlow v. New York*, 268 U. S. 652, 45 S. Ct., 625, 69 L. Ed. 1138) Justice Oliver Wendell Holmes, in his dissenting opinion (which is now the law of the land), referred to the contention that a certain document or "manifesto" was not an exercise of the constitutional right of free speech because it was "an incitement," and Justice Holmes followed that statement with this:

"Every idea is an incitement which offers itself for belief and, if believed, is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth."

Now this statement of the law by Mr. Justice Holmes in 1925, which began to be followed by majority opinions of the Supreme Court within half a dozen years, is, according to the learned trial judge in this case, not the law in 1948.

We therefore inquire what has happened to abridge this constitutional right, and the answer of course is the passage by Congress of the *Taft-Hartley Act*.

In all of the constitutional authorities on the subject of free speech in general and of peaceful picketing in particular, it is either stated specifically and emphatically or implied as being too clear and elementary to require elaboration that no statute may abridge the rights secured by the Constitution. In some of the cases, as *A. F. of L. v. Swing*, 312 U. S. 321, 61 S. Ct. 568, 85 L. Ed. 855, it was not a statute but a state policy which sought to abridge the constitutional right of

peaceful picketing. In other cases the attempted infringement of the constitutional right was by means of a statute, and in a large number of cases by a penal statute, but these statutes have been stricken down.

The learned judge does not suggest in his opinion that this particular statute, having been passed by the Congress of the United States, stands on any higher plane than the statute of a state or subdivision thereof; and of course no such contention could be made. As a matter of fact, the prohibitions of the First Amendment are aimed directly at Congress,—“Congress shall pass no law” etc.

At page 107 of the record, the District Court said:

“It is evident that unless the decisions of the United States Supreme Court indisputably show the unconstitutionality of Section 8(b)(4)(A) * * *, this court should grant an appropriate injunction * * *”

To that statement by the court of the issues involved, let us add this additional issue, “Unless the Taft-Hartley Act, and in particular the cited portions, has in some way amended the First Amendment to the Constitution, the court had no jurisdiction to issue the injunction in this case.”

We wish to ask the Court to take judicial notice that the First Amendment has not been amended, and that it is still in full force and effect. We shall show that the Supreme Court of the United States has in the last two decades more and more strongly upheld

the rights secured by the First Amendment subject only to the clear and present danger rule.

II.

IF SECTION 8(b)(4)(A) SEEKS TO ABRIDGE THE RIGHT OF PEACEFUL PICKETING PURSUANT TO A PRODUCT BOYCOTT, AS IN THE CASE AT BAR, THEN SECTION 8(b)(4)(A) STANDS BEFORE THE COURT WITHOUT THE BENEFIT OF ANY PRESUMPTION OF CONSTITUTIONALITY.

As will be shown hereafter, the rights secured by the First Amendment have the special favor of the Courts for their protection—a special favor because they stand on a higher plane than rights of property. However, let us first consider the argument which will undoubtedly be made in support of Section 8(b)(4)(A), which is in question here, namely, that the section is presumed to be constitutional. We agree, of course, that the general rule is that a legislative act is presumed to be constitutional, but there is a special rule which applies to legislation seeking to infringe the provisions of the Bill of Rights, and in particular legislation which seems to abridge the rights secured by the First Amendment.

Thus, Mr. Justice Reed in the very recent decision in *United States v. Congress of Industrial Organizations*, decided June 21, 1948, U. S., construing and applying another portion of the Labor Management Relations Act, 1947, quotes with approval the following language of earlier opinions of the high Court:

“Free discussion of the problems of society is a cardinal principle of Americanism—a principle which all are zealous to preserve.” (*Pennekamp v. Florida*, 328 U.S. 331, 346, 66 S. Ct. 1029, 90 L. Ed. 1295.)

“* * * the First Amendment does not speak equivocally. It prohibits any law ‘abridging the freedom of speech or of the press.’ It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society will allow.” (*Bridges v. California*, 314 U. S. 252, 263, 62 S. Ct. 190, 86 L. Ed. 192.)

In the leading case of *Thomas v. Collins*, 323 U. S. 516, at 529, 65 S. Ct. 315, 89 L. Ed. 436, the Supreme Court of the United States had before it a statute of the State of Texas, a statute whose validity and constitutionality had already been upheld by the Supreme Court of the State of Texas. This legislation sought to abridge, in a very mild and indirect manner to be sure, the right of assemblage secured by the First Amendment. It was not such a direct abridgement as the ordinance construed in *Hague v. Committee*, 307 U. S. 496, 59 S. Ct. 954, 83 L. Ed. 1423, which sought to prevent absolutely a peaceful assemblage unless approved by the chief of police. However, the Texas statute, by requiring a labor organizer to register with the Secretary of State, before doing any organizing work, that is to say, before soliciting any members for the union, did interfere with and restrict the activities of a labor organizer to some extent, and the section was held unconstitutional insofar as it sought

to accomplish that purpose. The Supreme Court in that case, said:

“The case confronts us again with the duty our system places on this Court to say where the individual’s freedom ends and the State’s power begins. Choice on that border, now as always delicate, is perhaps more so where the *usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment* * * * That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice.” (323 U.S. at p. 529, cited with approval in *United States v. Congress of Industrial Organizations, supra*, and *In re Porterfield* (April 30, 1946), 28 Cal. (2d) 91, 103, 168 P. (2d) 705.)

It must be borne in mind that the Taft-Hartley Act is an Act of Congress and therefore it comes directly within the prohibitions of the First Amendment, which is a direct and positive prohibition in the following language:

“Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press; or the right of the people peacefully to assemble and to petition the Government for redress of grievances.”

We therefore do not have before us the question involved in *In re Blaney*, 30 Cal. (2d) 643, 184 P.

(2d) 892, of a state anti-secondary boycott statute abridging freedom of speech, nor *Carlson v. California*, 310 U. S. 106, 60 S. Ct. 746, 84 L. Ed. 1104, *Hague v. Committee, supra*, nor *In re Bell*, 19 Cal. (2d) 488, 122 P. (2d) 22, nor the *Porterfield* case, *supra*, concerning anti-labor ordinances with the same effect. We have here a situation where Congress has done precisely the thing which the First Amendment says that Congress cannot do. It is the First Amendment which is therefore directly disobeyed, and not the First Amendment as incorporated by the Fourteenth.

In *U. S. v. Carolene Products*, 304 U. S. 144, at page 154 (Note 4), 58 S. Ct. 778, 82 L. Ed. 1234:

“There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the First ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.” (At the end citing *Stromberg v. California*, 283 U. S. 359, 369, 370, 51 S. Ct. 532, 535, 536, 75 L. Ed. 1117, 73 A.L.R. 1484; *Lovell v. Griffin*, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949, decided March 28, 1938. See also *Cantwell v. Connecticut*, 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213, 128 A.L.R. 1352; *Schneider v. New Jersey*, 308 U. S. 147, 60 S. Ct. 315, 89 L. Ed. 430.)

In another recent case the Supreme Court has made it clear that these constitutional provisions mean

exactly what they say and that they cannot be overridden by legislation:

“The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote. They depend on the outcome of no elections.” (*West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 638, 63 S. Ct. 1178, 1186, 87 L. Ed. 1628.)

In another leading case the court used similar language:

“Accordingly, in view of the *preferred position* the freedoms of the First Article occupy, statute in its present application must fall. *It cannot be sustained on any presumption of validity.*” (*Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, at 167, 64 S. Ct. 438, 88 L. Ed. 645.)

In still another recent decision involving wartime conditions where the Supreme Court might have presumed the “clear and present danger rule” to apply, the Supreme Court again denied the presumption of constitutionality to legislation abridging the Bill of Rights in *Ex Parte Mitsuye Endo*, 323 U.S. 283, at 299, 65 S. Ct. 208, 89 L. Ed. 243.

“We mention these constitutional provisions not to stir the constitutional issues which have been argued at the bar but to indicate the approach

which we think should be made to an order of the Chief Executive that touches the sensitive area of rights specifically guaranteed by the Constitution. *This Court has quite consistently given a narrower scope for operation of the presumption of constitutionality when legislation appeared on its face to violate a specific prohibition of the Constitution.*”

III.

THE PERSONAL RIGHTS SECURED BY THE FIRST AMENDMENT, AND PARTICULARLY THE RIGHT OF FREE SPEECH, TAKES PRECEDENCE IN THE EYES OF THE COURT OVER PROPERTY RIGHTS, AND ARE NOT JUDGED BY THE SAME CONSTITUTIONAL PRINCIPLES.

It must be borne in mind that the rights of the employer in this case who is the charging party are property rights, pure and simple. Any detriment which he suffers from any acts of the union consists of a loss of profits, and of that alone. It has been repeatedly held that damage to an employer in such cases is *damnum absque injuria*. In one of the leading cases in California (*McKay v. Retail Automobile Salesmen*, 16 Cal.(2d) 311, 106 P.(2d) 373), the picketing which was held by the State Supreme Court as being the exercise of the right of free speech had, according to the evidence in the case, resulted in closing down the business.

The rights of the workers on the other hand, the union members, are personal rights. The right to

picket, the right to boycott, the right to work or to refrain from working:

Thornhill v. Alabama, 310 U.S. 88, at pp. 104, 105, 60 S.Ct. 890, 87 L.Ed. 1290;

A.F. of L. v. Swing, 312 U.S. 321, 61 S.Ct. 568, 85 L.Ed. 855;

Cafeteria Employees Union v. Angelos, 320 U.S. 293, 64 S.Ct. 126, 88 L.Ed. 58;

Hunt v. Crumbock, 325 U.S. 821, 65 S.Ct. 1545, 89 L.Ed. 1954.

In the recent case of *Marsh v. Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 the Court said (at page 509):

“When we balance the constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position. As we have stated before, the right to exercise the liberties safeguarded by the First Amendment lies at the foundation of free government by free men and we must in all cases weigh the circumstances and appraise * * * the reasons * * * in support of the regulation of (those) rights.”

See also *Tucker v. Texas*, 326 U.S. 517, 66 S.Ct. 274, 90 L.Ed. 274.

The following cases are cited by the Court in *Marsh v. Alabama* in support of the principle thus stated:

“The constitutional protection of the Bill of Rights is not to be evaded by classifying with business callings an activity whose sole purpose

is the dissemination of ideas * * *” (*Jones v. City of Opelika*, 316 U.S. 584, (Stone, C.J. dis.) 319 U.S. 103, 63 S.Ct. 890, 87 L.Ed. 1290.)

“The fact that the ordinance is ‘nondiscriminatory’ is immaterial. The protection afforded by the First Amendment is not so restricted. A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position.” (*Murdock v. Pennsylvania*, (Douglas, J.), 319 U.S. 105, 115, 63 S.Ct. 870, 87 L.Ed. 1292, 146 A.L.R. 81).

“The exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment is as obnoxious (*Grosjean v. American Press*, *supra*, (297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660); *Murdock v. Pennsylvania*, *supra*), as the imposition of a censorship or a previous restraint. *Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357. * * *

“The exemption from a license tax of a preacher who preaches or a parishioner who listens does not mean that either is free from all financial burdens of government * * * But to say that they like other citizens may be subject to general taxation does not mean that they can be required to pay a tax for the exercise of that which the First Amendment has made a high constitutional privilege.” (*Follett v. Town of McCormick*, (Douglas, J.), 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938, 152 A.L.R. 317).

Members of labor organizations as well as other persons are constitutionally guaranteed the right to express themselves on matters of public concern without being subject to prior restraint.

Near v. Minnesota, Grosjean v. American Press Company, Thornhill v. Alabama, Carlson v. California, all cited *supra*.

In the *Blaney* case, discussed *infra*, 30 Cal. (2d) 643, 184 P. (2d) 892, invalidating the California anti-boycott law, it was thus said:

“Regardless of the area to which the concerted labor activity, such as picketing or boycotting may be constitutionally limited, and the facts of the case at bar as above disclosed, the statute here involved cannot stand * * * It permits the *prior censorship* of matters undeniably protected by the constitutional guarantee of free speech and free press. (See *Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357.) It makes enjoined the mere combination or agreement resulting in the refusal by employees to handle goods for their employer because of a dispute between some other employer and his employees or a labor organization.”

As was stated in *Thomas v. Collins*, *supra*:

“* * * the right either of workmen or of unions under these conditions to assemble and discuss their own affairs is as fully protected by the Constitution as the right of businessmen, farmers, educators, political party members, or others to assemble and discuss their affairs and *to enlist the support of others*.”

In the *Thomas* case, the Court reaffirmed the views expressed in the *Thornhill* case and *Hague v. Committee*, both *supra*, that the power of the state to regulate labor organizations must not trespass upon the domains set apart for free speech and free assembly, saying:

“Where the line shall be placed in a particular application rests * * * on the concrete clash of particular interests and the community’s relative evaluation of both of them and of how the one will be affected by the specific restriction, the other by its absence. *That judgment in the first instance is for the legislative body. But in our system where the line can constitutionally be placed presents a question this Court cannot escape answering independently*, whatever the legislative judgment, in the light of our constitutional tradition. *Schneider v. State*, 308 U.S. 147, 161. And the answer, under that tradition, can be affirmative to support an intrusion upon this domain, only if grave and impending public danger requires this.”

IV.

THE RECOGNITION BY THE SUPREME COURT OF THE UNITED STATES OF THE COGNATE RIGHTS SECURED BY THE FIRST AMENDMENT AND SUBJECT ONLY TO THE CLEAR AND PRESENT DANGER RULE HAS DEVELOPED STEADILY FOR THE LAST QUARTER CENTURY.

It is extremely interesting to note that the arguments we are making in favor of the rights of free speech in general, and in particular of peaceful picketing, are neither new nor are they what might be called

radical. The right of free speech, subject only to the clear and present danger rule, goes back to *Schenck v. U. S.*, 249 U. S., 47, 39 S. Ct. 247, 63 L.Ed. 470, in the following language:

“The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.”

A number of cases about that time discuss or mention this rule and the language just quoted as presented in the dissenting opinion of Mr. Justice Holmes, concurred in by Justice Brandeis in *Gitlow v. New York*, *supra*, 268 U. S. at pp. 672-673. This was the same Oliver Wendell Holmes who while on the Supreme Bench of Massachusetts, away back in 1896 in another dissenting opinion, recognized and upheld the right of picketing by a union as an act of competition with the employer. This dissenting opinion, cited by the Supreme Court of California in *McKay v. Retail Automobile Salesmen*, *supra*, 16 Cal. (2d) at p. 321, is now the law of the land, the case being *Vegeahn v. Guntner*, 167 Mass. 92, 36 L.R.A. 722.

The concurring opinion of Mr. Justice Brandeis in *Whitney v. California*, 274 U. S. 357, 374, 47 S. Ct. 641, 71 L.Ed. 1095, amplified the clear and present danger test by declaring that “Fear of serious injury cannot alone justify suppression of free speech and assembly.”

The *Gitlow* case was followed by *Stromberg v. California*, 283 U. S. 359, 51 S. Ct. 532, 75 L.Ed. 1117, in

which the Supreme Court set aside a statute of the State of California which would have prohibited the display of a red flag as being a denial of constitutional rights. This opinion was written by Chief Justice Hughes, concurred in by Justices Holmes, Brandeis, Roberts, Vandervanter and Sutherland, with Justices McReynolds and Butler the only dissenters. Next came the epochal decision written by Chief Justice Hughes, in which a statute of the State of Minnesota was set aside on the ground that in attempting to permit an injunction against the publication of a libel it would have made possible the suppression of a scurrilous and defamatory newspaper. (*Near v. Minnesota, supra.*) Chief Justice Hughes upheld the constitutional right of free speech in elaborate, voluminous and eloquent language. Incidentally, in this case there were four dissenters: Justices Butler, Vandervanter, McReynolds and Sutherland.

The next case in the line is *Grosjean v. American Express, supra*, where, in a unanimous opinion, the Supreme Court set aside a statute of Huey Long's legislature in the State of Louisiana which would have abridged freedom of the press by the levy of unreasonable taxes.

Next follows *De Jonge v. State of Oregon*, 299 U. S. 353, 57 S. Ct. 255, 81 L. Ed. 278, which was a sedition case involving the criminal syndicalism law of Oregon. Although the opinion describes what may well have been a seditious meeting participated in by Communists and others with no love for our Constitution, still the particular defendant who was prosecuted was

not shown to have done any unlawful act (other than to attend and participate in a peaceful meeting), and the Supreme Court in a unanimous opinion set aside his conviction. Chief Justice Hughes for the Court said (at page 283):

“Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution.” (Citing the *Gitlow*, *Stromberg*, *Near* and *Grosjean* cases just referred to.)

The Chief Justice continued,

“The right of peaceful assembly is a right cognate to those of free speech and free press and is equally fundamental.”

Next is *Herndon v. Lowry*, 301 U. S. 242, 57 S. Ct. 732, 81 L. Ed. 1066, another sedition case where it appeared there was an actual plot against the United States Government which might have led to rebellion and the secession of certain states or parts of states. But there again it appeared that no unlawful act was committed by the defendant, other than as comprehended in free speech and assembly, so his conviction was set aside by an opinion by Mr. Justice Roberts, with Justices Vandevanter, Sutherland and Butler dissenting. In this case the clear and present danger rule is emphasized as follows:

“The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justifica-

tion in a reasonable apprehension of danger to organized government."

Now we come to the first case in which picketing is mentioned—*Senn v. Tile Layers Protective Union*, 301 U. S. 468, 57 S. Ct. 857, 81 L. Ed. 1229, in which the action of the Courts of Wisconsin, permitting the picketing by the tile layers union of a tile layer who insisted on doing his own work and in refusing to hire a journeyman was approved. Mr. Justice Brandeis wrote the opinion, with Justices Butler, Vandevanter, McReynolds and Sutherland dissenting. In this case, Mr. Justice Brandeis used this language, which has been frequently quoted in subsequent cases,

"Members of a union might without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution."

Next follow two cases in which the distribution of handbills was upheld as a constitutional right even though in violation of local ordinances (*Lovell v. City of Griffin*, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949 (a unanimous decision), and *Schneider v. New Jersey*, 308 U. S. 147, 60 S. Ct. 315, 89 L. Ed. 430, in which in one instance the handbills were distributed by a picket (Justice McReynolds being the sole dissenter).

Now we come to *Thornhill v. Alabama*, frequently referred to herein in which peaceful picketing in violation of a penal statute of the State of Alabama was held as a constitutional right. This was a unanimous

decision, except for the dissent of Justice McReynolds. The companion case was *Carlson v. California*, supra, the same ruling involving a county statute with the same dissent. An interesting thing about the *Thornhill* decision is that since the Court had no line of cases to refer to in which the right of picketing had been upheld as a constitutional right, except the passing reference of Justice Brandeis in the *Senn* case, which might have been dictum, and the circumstance referred to in the *Schneider* case, the Supreme Court without hesitatiton and without dissent except by Justice McReynolds, upheld the right of peaceful picketing as a constitutional right, citing and relying upon the following authorities referred to herein: the *Schneider*, *Lovell*, *De Jonge*, *Grosjean*, *Near*, *Stromberg* and *Gitlow* cases, showing the recognition by the Supreme Court of the cognate character of all of these rights protected by the First Amendment—assembly, free speech and free press.

In the March 1948 number of the California Law Review appears a very interesting 40 page article entitled, "*Where Are We Going with Picketing?*" This article discusses the constitutional decisions of the State of California but lays particular stress on the decisions of the Supreme Court of the United States, some of which have been referred to herein. This article discusses also the constitutional cases involving the organization known as *Jehovah's Witnesses*, nineteen decisions, from *Schneider v. State*, in 308 U. S. down to *Marsh v. Alabama*, 326 U. S. 501. These cases involved freedom of worship combined in the

various cases with either freedom of speech, freedom of the press, or freedom of assembly. Some of the cases will be referred to later.

Next in line come two cases decided on the same day: *Milk Wagon Drivers v. Meadowmoor Dairies*, 312 U. S. 287, 61 S. Ct. 552, 85 L. Ed. 836, 132 A.L.R. 1200, and *A. F. of L. v. Swing, supra*, 312 U. S. 321. In the *Meadowmoor* case the right of peaceful picketing was upheld but an injunction granted and approved by the Illinois courts was affirmed because of the imminent danger of a recurrence of extreme violence which had gone on over several years. The Supreme Court made it clear that as soon as the pressure of the danger of violence should be removed, then the injunction should be set aside. In other words, the *Meadowmoor* case absolutely upheld the right of peaceful picketing.

In *A. F. of L. v. Swing, supra*, it appeared that the beauticians were picketing a beauty shop for the purpose of organization, no member of the union being employed therein. The Illinois courts held, according to the public policy of the state as approved by its Supreme Court, that picketing could not be permitted except in a dispute involving an employer and his own employees. The Supreme Court said (312 U. S. at pages 325, 326) :

“The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the

state. A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him."

In connection with this language of the Supreme Court in the *Swing* case to the effect that no statute may limit the allowable area of a labor dispute to an employer and his own employees, we find (on page 205 of the record herein) that this was the precise contention made by the appellee in this case where the learned and active attorney for the General Counsel said:

"I think the *Ritter's Cafe* case, decided in 1942, furnishes us with a basis for the argument that Congress may limit industrial conflict so that the conflict takes place only between the employer immediately concerned and his employees, and so as to prevent the unions from bringing pressure to bear upon the employees of another employer so that they will engage in a concerted refusal to handle the goods of the employer with whom the union is having the real dispute, and, therefore, force the second employer to cease doing business with that particular employer."

This is undoubtedly the basic contention of the prosecution in this case.

The next case in the development of this recognition of constitutional rights is *Bridges v. California*, *supra*, 314 U. S. 252, 62 S. Ct. 190, 86 L. Ed. 192, where the

Supreme Court of California was overruled in a case involving the right of free speech, it being alleged that the free speech constituted contempt of court. In the case of a labor leader and of a conservative newspaper (the Los Angeles Times) the right of comment even upon pending and undecided cases was upheld on constitutional grounds under the clear and present danger rule:

“* * * the ‘clear and present danger’ language of the *Schenck* case has afforded practical guidance in a great variety of cases in which the scope of constitutional protections of freedom of expression was in issue. It has been utilized by either a majority or minority of this Court in passing upon the constitutionality of convictions under espionage acts, *Schenck v. United States*, *supra*; *Abrams v. United States*, 250 U. S. 616, 40 S. Ct. 17, 63 L. Ed. 1173; under a criminal syndicalism act, *Whitney v. California*, *supra*; under an ‘anti-insurrection’ act, *Herndon v. Lowry*, *supra*; and for breach of the peace at common law, *Cantwell v. Connecticut*, *supra*. And very recently we have also suggested that ‘clear and present danger’ is an appropriate guide in determining the constitutionality of restrictions upon expression where the substantive evil sought to be prevented by the restriction is ‘destruction of life or property, or invasion of the right of privacy.’ *Thornhill v. Alabama*, 310 U. S. 88, 105, 60 S. Ct. 736, 745, 84 L. Ed. 1093.

“Moreover, the likelihood, however great that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be ‘substantial’, Brandeis,

J., concurring in *Whitney v. California, supra*, 274 U. S. at page 374, 47 S. Ct. at page 647, 71 L. Ed. 1095; it must be 'serious', *Id.*, 274 U. S. at page 376, 47 S. Ct. at page 648, 81 L. Ed. 1095. And even the expression of 'legislative preferences or beliefs' cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression. *Schneider v. State*, 308 U. S. 147, 161, 60 S. Ct. 146, 151, 84 L. Ed. 155.

"What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthestmost constitutional boundaries of protected expression, nor do we here. They do more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press'. It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."

This luminous statement of the clear and present danger has been followed in subsequent cases and has never been questioned in the slightest degree. It must therefore be recognized as the law and must be applied by the Court in the case at bar.

The next two cases are frequently misunderstood and frequently misquoted and misinterpreted. The

ruling in the two cases, however, is very clear. In the *Ritter's Cafe* case (*Carpenters' Union v. Ritter's Cafe*, 315 U. S. 722, 62 S. Ct. 807, 86 L. Ed. 1143), it was held that in a labor dispute picketing might be prohibited where directed against a business having no economic nexus with the business against which the original dispute was pressed. The *Wohl* case (*Bakery Wagon Drivers Local v. Wohl*, 315 U. S. 769, 62 S. Ct. 816, 86 L. Ed. 1178), held that picketing of a product of a struck employer is within the allowable area and must be permitted. The district judge herein (R. 111) states that the *Ritter's Cafe* case was decided on the ground that the picketing there was a form of "forceful technique". As a matter of fact, the decision had nothing whatever to do with force of any kind, and the sole basis of the decision was that the fully unionized cafe which was being picketed was entirely outside of the nexus of the dispute which arose over the construction job of a building a mile and half distant. As applied to the case at bar, these two decisions are controlling. In the *Wohl* case the Court upheld picketing of a product, even in violation of the statutes of the state of New York. In the case at bar, the Court must uphold the picketing of a product even though prohibited by a statute of commerce.

A significant feature of the *Ritter's Cafe* decision is that it does not refer in any way to the clear and present danger rule, and it is interpreted by opposing counsel in the case at bar as furnishing a basis for the limiting of picketing to a dispute between an employer and his own employees.

It is very significant that the next case in line (*Cafeteria Employees Union v. Angelos*, 320 U. S. 293, 64 S. Ct. 126, 88 L. Ed. 58, decided a year and a half after the *Ritter's Cafe* case and being a unanimous decision of the Court) repeats the language of the *Swing* case and holds that a statute may not limit the area of an industrial dispute to an employer and his own employees.

Now we come to the very important case of *Thomas v. Collins*, *supra*, in which the Court confirmed several fundamental principles: First, that a statute abridging the right secured by the First Amendment has no presumption of constitutionality in that the usual presumption is balanced by the favor accorded these constitutional rights; second, that these personal rights take precedence over property rights. Again, that these rights may be interfered with only under the clear and present danger rule. At page 530 the Court said:

“For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It

is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly. It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, cf. *De Jonge v. Oregon*, 299 U. S. 353, 364, 57 S. Ct. 255, 259, 81 L. Ed. 278, and therefore are united in the First Article's assurance. Cf. 1 *Annals of Congress* 759-760."

V.

THE PICKETING COMPLAINED OF HEREIN WAS FOR A LAWFUL OBJECT AND WAS IN THE EXERCISE OF CONSTITUTIONAL RIGHTS.

In *Thornhill v. Alabama*, *supra*, the picketing therein described which was for the purpose of enforcing a boycott against a certain struck establishment and which was moreover in violation of a final statute (31 U. S. at pp. 91, 92) was held to be the exercise of a constitutional right. In other words, picketing pursuant to a labor dispute directed at the premises of the employer or at the products of the employer is a constitutional right.

Bakery Wagon Drivers' Local v. Wohl, *supra*;
McKay v. Retail Auto Salesmen's Union, *supra*, 16 Cal. (2d) at p. 319, 106 P. (2d) 373;

Smith Metropolitan Market v. Lyons, 16 Cal. (2d) 389, 394, 106 P. (2d) 414;

Shafer v. Registered Pharmacists Union, 16 Cal. (2d) 379, 382, 106 P. (2d) 403;

Fortenbury v. Superior Court, 16 Cal. (2d) 405 and 408, 106 P. (2d) 411.

See also

Park & Tilford Import Corp. v. Int'l Brotherhood of Teamsters, 27 Cal. (2d) 599, 608, 165 P. (2d) 891, 162 A.L.R. 1426.

“It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society.” (310 U. S. at p. 104.)

Picketing for a purpose reasonably related to employment conditions and to the purposes of collective bargaining is picketing for a lawful purpose, as per the authorities last cited. In *A. F. of L. v. Swing*, *supra*, the Supreme Court stated the purpose in still stronger terms in this language:

“Communication by such employees of the facts of a dispute *deemed by them to be relevant to their interests* can no more be barred because of the concern for economic interests against which they are seeking to enlist public opinion than could the utterance protected in *Thornhill's* case.” (312 U. S. at p. 326.)

This primary purpose or objective of picketing, that is as a demonstration for the protection of the interests of the workers in connection with their employment has been repeatedly upheld in the face of a contention that in the course of the picketing some other incidental purpose or objective appeared or was charged to exist.

Speaking frankly, as ex-Justice Byrnes would say, this contention of "lawful purpose" for picketing has been used and misused to justify the abridgement of this constitutional right. The contention which is made in the case at bar is that because Congress passed a statute which apparently prohibited picketing of the product of a struck employer, therefore such picketing immediately *ipso facto* becomes unlawful as "being against public policy". Now the Supreme Court of the United States has been very definite in indicating exactly what regulation of the exercises of these constitutional rights is allowable and what form of prohibition of the exercise of these rights cannot be tolerated. Briefs in opposition to these constitutional rights always refer to general statements by various Courts to the effect that these rights secured by the First Amendment are not absolute but are subject to regulation. However, that statement does us no good in the resolution of the issues before the Court in this case. What we are concerned with is what form of regulation is allowable and what extent of regulation or prohibition has been definitely disapproved by the Court.

As pointed out above, it is held that economic action, including boycott and picketing, is justifiable where it is reasonably related to employment relations and the purposes of collective bargaining. When this is the primary purpose of the economic action, the action is legal and it does not become illegal because some other incidental purpose is being achieved, as, for instance, damage to the employer or to some one allied with him, nor does it become illegal because of the passage of some statute purporting to prohibit the activity. In *A. F. of L. v. Swing, supra*, the publicizing of a labor dispute by picketing is held to be lawful where the subject of the dispute is "deemed" by the union to be relevant to its interests even though the economic action was absolutely prohibited by the policy of the particular state.

In the case of *Carpenters Union v. Ritter's Cafe, supra*, the Texas courts disapproved of picketing outside of the nexus of the dispute, and the Supreme Court of the United States with strong dissenting opinions refused to interfere with this action of the Texas courts. While this case has apparently been disapproved by subsequent decisions (*Cafeteria Employees v. Angelos, supra*; *Thomas v. Collins, supra*), still, if it be accepted as stating the law applicable to the case at bar, it does no more than to disapprove of a sympathetic boycott or picketing pursuant thereto while definitely upholding the right to picket an unfair product (315 U. S. at 727) which is exactly what the defendants are contending for here.

In some other cases, including *Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board*, 315 U. S. 740, 748, 62 S. Ct. 820, 86 L. Ed. 1154, and one or two other cases arising in Wisconsin, the state's police power, that is to say, the right of the state to keep the peace, has been upheld.

The question of whether the picketing here was for an unlawful purpose does not require lengthy or numerous citations. The picketing here was peaceful, in connection with a legitimate labor dispute, and was directed at the employer and at the products of the employer. This precise form of product boycott was involved in *Bakery and Pastry Drivers v. Wohl*, *supra*, approved in *Carpenters Union v. Ritter's Cafe*, *supra*, in the case of *Fortenbury v. Superior Court*, *supra*, 16 Cal. (2d) 405, 106 P. (2d) 411, and was the same type of picketing—except that it was entirely peaceful—as that involved in *Milk Wagon Drivers v. Meadowmoor Dairies*, *supra*, where the picketing was disapproved only because of its manner.

This picketing has taken place in violation of a statute purporting to prohibit picketing pursuant to a boycott. That was precisely the situation in *Thornhill v. Alabama* where the picketing was held to be a constitutional right.

To argue that this picketing was for an unlawful purpose is simply to contend that a statute may prohibit what the Constitution permits.

VI.

SECTION 8(b)(4)(A) OF THE ACT IN QUESTION CANNOT
VALIDLY BE APPLIED TO RESTRAIN PEACEFUL PICKET-
ING PURSUANT TO A PRODUCT BOYCOTT.

As District Judge Rifkind said recently with respect to Section 8(b)(4)(A) in *Douds v. Metropolitan Federation of Architects*, decided January 26, 1948, 75 F. Supp. 672:

"The Taft-Hartley Act has thus far had but little judicial attention. * * * No case thus far has reached an appellate court. Even cursory examination of the stated facts and the quoted portions of the Act reveals that the case bristles with questions of constitutional law, statutory construction and practical application. * * *

"Certainly it is an object of very many strikes and picket lines to induce a reduction in the struck employer's business by an appeal to customers—'any person'—to cease dealing with the employer. This is one of the most conspicuous weapons employed in many labor disputes. *The effect of a strike would be vastly attenuated if its appeals were limited to the employer's conscience.* I shall proceed on the assumption, warranted by the history of the Act, that it was not the intent of Congress to ban such activity, although the words of the statute, given their broadest meaning may seem to reach it.

"* * * recourse may be had to the *legislative history* to discover the mischief which Congress intended to remedy * * * with the aid of the glossary provided by the law of secondary boycott * * *"

The conference agreement adopted the provisions of the Senate version of Section 8(b), with clarifying changes and with one addition to the category of unlawful objectives of strikes and boycotts. "Under clause (A)—[of Section 8(b)(4)] strikes or boycotts, or attempts to induce or encourage such action, were made unfair labor practices if the purpose was to force an employer or other person to cease using, selling, handling, transporting or otherwise dealing in the products of another, or to cease doing business with any other person. Thus it was made an unfair labor practice for a union to engage in *a strike against employer A for the purpose of forcing that employer to cease doing business with employer B*. Similarly, it would not be lawful for a union to *boycott employer A because employer A uses or otherwise deals in the good of, or does business with, employer B*." (House Conference Report No. 510 on H. R. 3020, June 3, 1947, p. 43.)

In other words, this clause is aimed at the true secondary boycott, where full scale economic sanctions are placed by a union against an employer with whom no dispute exists for the purpose of compelling him to shun commercially the firm where the primary dispute exists. (Senate Report No. 105 on S. 1126, April 17, 1947, p. 22.) While the House provision differed from the Senate version which was adopted, the problem was similarly described by the Hartley Committee on Education and Labor in these terms:

"His (the employer's) business on occasions have been virtually *brought to a standstill* by disputes

to which he has not been a party, and in which he had no interest."

(House Report No. 245 on H. R. 3020, April 11, 1947, p. 5.)

Senator Pepper contended that "the language would forbid one man or one agent of a labor union going to the employees of another employer working on a product put out by a manufacturer who would be unfair to them in their opinion and attempting to persuade or induce those workers not to handle the output of the factory in which there was a disagreement with the workers." To which, Senator Taft immediately replied—

"I do not quite understand the case which the Senator has put. *This provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees.*"

(93 Daily Cong. Rec. 4322-4323, 4/20/47.)

"Examination of these expositions of Congressional purpose," says Judge Rifkind, "indicates that the provision was understood to outlaw what was theretofore known as a secondary boycott. It is to the history of the secondary boycott, therefore, that attention should be directed."

Under the modern trend of decision, a clear distinction has been drawn between picketing the products of the struck plant, and boycotting or striking a customer, supplier, or distributor of the struck plant.

(Gromfine, *Labor's Use of the Secondary Boycott* (1947), 15 Geo. Wash. L. Rev. 327; *Goldfinger v. Feintuch*, 276 N. Y. 281, 11 N. E. (2d) 910; *Fortenbury v. Superior Court*, 16 Cal. (2d) 405, 106 P. (2d) 411.)

In terms of the unmistakable trend in the law of boycotts, the legitimate interests of the labor union in prosecuting its dispute and the "unity of interest" between the manufacturer and the distributor are both relevant to the construction and applicatiton of this legislation. (Cf. Senate Minority Report No. 105, Pt. 2, on S. 1126, April 22, 1947, p. 20; 93 Daily Cong. Rec. 4156, 4/25/47.)

The act of picketing the Sealright finished products at the Los Angeles-Seattle Motor Express, Inc., and of picketing the Sealright paper (consigned by the employer's New York plant to the Los Angeles plant for manufacturing goods under strike conditions), peacefully and without interference with the normal course of business at either of these two concerns cannot be held to constitute an unlawful "secondary boycott" within the meaning of Section 8(b)(4)(A). Nor can it properly be said that such peaceful picketing is "the type of coercion that is attended with serious repercussions and dire consequences upon the interests of the two strangers of the labor dispute between Sealright and the Union". (R. 110-111.)

In the recent decision of the high Court in *United States v. Congress of Industrial Organizations*, decided June 21, 1948, U. S., construing and applying another portion of the Labor Management Relations Act, 1947, Mr. Justice Reed said:

“The purpose of Congress is a dominant factor in determining meaning. There is no better key to a difficult problem of statutory construction than the law from which the challenged statute emerged. Remedial laws are to be interpreted in the light of previous experience and prior enactments. Nor, where doubt exists, should we disregard informed congressional discussion.”

The District Court herein condemns picketing of the products of Sealright Pacific Ltd. “as a form of forcible technique that has been held to be subject to restrictive regulation by the State in the public interest *on any reasonable basis.*”

This holding ignores the clear statement of the Supreme Court in *West Virginia State Board of Education v. Barnette*, *supra*, that—

“The right of a State to regulate, for example, a public utility, may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a ‘*rational basis*’ for adopting. But freedom of speech and press, of assembly and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect.”

VII.

SECTION 8(b)(4)(A) MUST BE HELD INVALID ON ITS FACE, UNLESS PEACEFUL PICKETING UNDER THE CIRCUMSTANCES OF THIS CASE IS DEEMED EXCLUDED FROM ITS TERMS BY THE IMMUNIZING LANGUAGE OF THE "FREE SPEECH PROVISIO" OF SECTION 8(c).

Where regulation or infringement of liberty of discussion and the dissemination of information and opinion are involved, there are special reasons for testing the challenged statute on its face. (*Jones v. Opelika*, 316 U. S. 584, 319 U. S. 103, 63 S. Ct. 890, 87 L. Ed. 1290.)

As was said in *Thornhill v. Alabama*, *supra*, 310 U. S. 86, 96, 60 S. Ct. 736, 84 L. Ed. 1093, concerning a statute prohibiting picketing:

"There is a further reason for testing the section on its face. Proof of the abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas."

The existence of such a statutory provision "which does not aim specifically at evils within the allowable area of state control, but on the contrary sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech" inevitably "results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview".

Carlson v. California, *supra*;

Schneider v. New Jersey, *supra*, 308 U. S. 147, 162-165, 60 S. Ct. 315, 89 L. Ed. 430;

Hague v. C. I. O., 307 U. S. 496, 59 S. Ct. 954, 83 L. Ed. 1423;

Lovell v. Griffin, 303 U. S. 444, 451, 58 S. Ct. 666, 82 L. Ed. 949;

Stromberg v. California, 283 U. S. 359, 369, 51 S. Ct. 532, 75 L. Ed. 1117.

If certain provisions of a statute, or particular applications of broad statutory language operate to prohibit peaceful picketing, the entire section is invalid even though it may also prohibit acts that may properly be made illegal. Thus, on October 3, 1947, the Supreme Court of California invalidated the so-called "Hot Cargo and Secondary Boycott Act" of this State (California Labor Code §§ 1131-1136) in a 6-to-1 decision, previously cited herein: *In re Blaney*, 30 Cal. (2d) 643, 651-653, 184 P. (2d) 892. (See also *In re Porterfield*, 28 Cal. (2d) 91, 168 P. (2d) 706, 176 A.L.R. 675; *In re Bell*, 19 Cal. (2d) 488, 495, 122 P. (2d) 22.)

There the California Supreme Court discusses in detail the application of decisions of the Supreme Court of the United States to the state enactment rendering unlawful and subject to injunctive restraint:

"* * * any combination or agreement resulting in a refusal by employees to handle goods or to perform any services for their employer because of a dispute between some other employer and his employees or a labor organization * * *

"* * * any combination or agreement to cease performing, or to *cause any employee to cease*

*performing any services for any employer, or to cause any loss or injury to such employer, or to his employees, for the purpose of inducing or compelling such other employer to refrain from doing business with, or handling the products of any other employer, because of a dispute between the latter and his employees or a labor organization * * **

(California Labor Code § 1134.)

As the single dissenting justice correctly pointed out:

“It may be noted that by the enactment of the Labor Management Relations Act of 1947 (Ch. 120, Public Law 101), including amendment of the National Labor Relations Act, the Congress had declared ‘secondary boycott’ operations by concerted action to be an unfair labor practice with provisions for civil remedies. *That legislation is cast in language the same in substance and effect as section 1134 here under consideration.*”

(Dissenting opinion of Associate Justice Shenk, 30 Cal. (2d) at p. 675.)

Associate Justice Carter, citing numerous United States Supreme Court constitutional authorities, summarized the vice of the California law approximating Section 8(b)(4)(A) in these words:

“The Legislature manifestly sought in the instant case to prohibit every form of boycott, including some kinds which are occasionally characterized as ‘primary’. The deliberately chosen language, covering all such activities in general terms, with no attempt at segregation or classification, leaves this court with no alternative but to nullify the

act. Only by a carefully drawn statute which separately treats the various forms of concerted action loosely termed 'secondary boycotts' can the Legislature hope to accomplish the object of regulating those forms which may ultimately be held to be within its constitutional power."

(30 Cal. (2d) at p. 658.)

Section 8(b)(4)(A) must, under these same Supreme Court decisions, be declared invalid on its face, unless peaceful picketing under the circumstances herein is deemed excluded from its terms by the immunizing language of Section 8(c). The District Court in the instant case failed to give Section 8(c) any effect whatsoever, or to rule as to its applicability to Section 8(b)(4)(A).

Appellants are familiar with the long-standing canon of judicial construction that when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional, and by the other valid, the Courts will adopt that construction which will save the statute from constitutional infirmity. Only recently in *United States v. Congress of Industrial Organizations*, *supra*, the Supreme Court quoted this canon of construction in considering Section 304 of the Taft-Hartley Act, opining:

"* * * it is clear that Congress was keenly aware of the constitutional limitations on legislation and of the danger of the invalidation by the courts of any enactment that threatened abridgement of the freedoms of the First Amendment. It did not want to pass any legislation that would

threaten interferences with the privileges of speech or press or that would undertake to supersede the Constitution. The obligation rests also upon this Court in construing congressional enactments to take care to interpret them so as to avoid a danger of unconstitutionality.”

Confronted with this same problem of construction in passing upon a proposed application of Section 8(b)(4)(A) requested by the Regional Director for the Second Region of the Board, in proceedings for injunctive relief under Section 10(1), District Judge Rifkind said:

“It must be apparent that a construction of the Act which outlaws the kind of union activity here involved would almost certainly cast grave doubts upon its constitutionality. *It is preferable to interpret the disputed section so as to restrain only that kind of union activity which does not enjoy constitutional immunity.*”

(*Douds v. Metropolitan Federation of Architects*, *supra*, 75 F. Supp. 672.)

The legislative history of Section 8(c) makes it plain that Congress had no intention of interfering with the normal rights of either an employer or of his employees and their union, to effectively present views, arguments and opinions in the course of a labor controversy. (See for example, 93 Daily Cong. Rec. 4141, 4/25/47 where Senator Taft states, “The provision regarding free speech applies both to employer and employee”. Also, statements of Senators McClellan, Morse, and Taft, at 93 Daily Cong. Rec. 5094-

5095, 5/9/47; House Report No. 245 on H. R. 3020, April 11, 1947, p. 6.)

Prior to the enactment of the Labor Management Relations Act of 1947, the Courts construing Section 8(1) of the Wagner Act of 1935, held that an anti-union statement of an employer to his employees, standing alone, even if made on the eve of a representation election, was protected fully by the First Amendment and did not therefore constitute a violation of the statute, if the statement contained no threats of reprisal or promises of rewards. (*N. L. R. B. v. Virginia Electric & Power Company*, 314 U. S. 469, cited *infra* in *Thomas v. Collins*; *N. L. R. B. v. American Tube Bending Co.* (C.C.A. 2d), 134 F. (2d) 993, cert. den. 320 U. S. 768. See also *Matter of Bausch and Lomb Optical Co.*, 72 N.L.R.B. No. 21.)

Section 8(c) not only established in statutory form the decisional law eliminating as an unfair labor practice expressions of opinions, or argument in any form by an employer to his employees (provided it contained no threats or promises) and extended it to similar statements by employees and their unions—it declared that the expression or dissemination of such views, argument, or opinion, whether in written, printed, graphic or visual form, shall not be *evidence* of an unfair labor practice, “*under any of the provisions of this Act*”.

As the Supreme Court of the United States said in *Thomas v. Collins*,

“The First Amendment is a charter for government not for an institution of learnings. ‘Free

trade in ideas' means *free trade in the opportunity to persuade to action*, not merely to describe facts.

"Indeed, the whole history of the problem shows it is to the end of preventing action that repression is primarily directed and to preserving the right to urge it that the protections are given.

"Accordingly, decision here has recognized that *employers' attempts to persuade to action* with respect to joining or not joining unions are within the First Amendment's guaranty. *National Labor Relations Bd. v. Virginia Electric & P. Co.*, 314 U. S. 469 * * * When to this persuasion other things are added which bring about *coercion*, or give it that character, the limit of the right has been passed. But short of that limit, *the employer's freedom cannot be impaired. The Constitution protects no less the employees' converse right*. Of course espousal of the cause of labor is entitled to no higher protection than the espousal of any other lawful cause. It is entitled to the same protection." (323 U. S. at 537.)

It is significant that the language of Section 8(c) closely approximates the references in *Thornhill v. Alabama* and *Carlson v. California* to appropriate methods for "the dissemination of information concerning the facts of a labor dispute". In the *Thornhill* case, the Supreme Court refers to "the means used to publicize the facts of a labor dispute, whether *by printed sign, by pamphlet, by word of mouth, or otherwise*". The *Carlson* case holds that "The *carrying of signs and banners*, no less than the raising of a flag, is

a natural and appropriate means of conveying information on matters of public concern", citing *Stromberg v. California, supra*, and refers to "appropriate means, whether *by pamphlet, by word of mouth or by banner*", which is certainly equivalent to the "*written, printed, graphic or visual form*" of expression contemplated by Section 8(c).

A thorough search of the record herein will fail to disclose any evidence to sustain a finding that "*orders, force, threats or promises of benefit*" were employed by members of appellant Local 388 at any time to induce or encourage the employees of the trucking concern and terminals company not to transport or handle Sealright goods. There is not a single instance where any "*threat of reprisal, force, or promise of benefit*" characterized the picketing of the Sealright products, or the statements made in connection therewith. (As a matter of fact, the mention of "promise of benefit" in Section 8(c) would indicate that the language was meant to apply to employers rather than pickets.)

Moreover, as has already been pointed out, the picketing in question did not materially affect or interfere with the normal business being conducted at those concerns, and there was no intention on the part of the strikers to physically or otherwise obstruct the operations at those locations, or to picket any merchandise other than Sealright products.

Thus, unable to bring this picketing of the Sealright products within the exception clause of Section 8(c), appellee contended, and the District Court held that

such picketing is “*a forcible technique*”. In effect, this holding seeks to turn back the hands of the clock and to revive early judicial pronouncements, long since overruled that “*there can be no such thing as peaceful picketing*”. (*Atchison etc. v. Gee*, 139 Fed. 582; see also *Pierce v. Stablemen’s Union*, 156 Cal. 70; *Rosenberg v. Retail Clerks’ Assn.*, 39 Cal. App. 67, and *Moore v. Cooks Union*, 39 Cal. App. 538, all expressly renounced in *Lisse v. Local Union*, 2 Cal. (2d) 312, 41 P. (2d) 314, and *McKay v. Retail Automobile Salesmen’s Union*, *supra*.)

The charge originally filed before the Board (R. 27-30) contains no reference to threats of reprisal or force or promise of benefit. However, the petition for injunction (R. 2-8) based directly upon the charge has inserted in it (R. 5 and 6) the words above quoted, that is to say, an allegation that the pickets used force, threats, *or* promises of benefit, all without the slightest evidentiary support. In fact, the insertion of those words in the petition and in the findings of the Court (R. 136 and 137) is just a little bit unfair. It is evident that the only purpose of inserting those words was to attempt to deprive the pickets of the protection which appears to be specifically granted by the statute. In fact, the opinion of the Court (R. 104, 105) contains this very language as tending to support the correctness of the injunction and the jurisdiction of the Court to grant it.

In the leading case upholding the constitutional right of peaceful picketing (*Thornhill v. Alabama*, *supra*), the picketing there upheld as a constitutional

right (with elaborate citations of authority) describes precisely the acts of the pickets as immunized by the language of Section 8(c). The picketing is there referred to as publicizing a labor dispute. (310 U. S. at p. 102.) The intent of the picketing is referred to at page 100, namely, "to hinder, delay or interfere with the lawful business" and the effects, that is, actual interference with the business, are referred to at pages 104, 105.

At page 111 of the record herein the District Court refers to the concurring opinion of Mr. Justice Douglas in the *Wohl* case (315 U. S. at p. 775) and states that Mr. Justice Douglas therein "delineates the evils of the secondary boycott * * *" Now, the facts are that the *Wohl* case involved the boycott of a product which is not generally referred to as a secondary boycott, although it is so denominated by the district judge in the case at bar. The Supreme Court with *no dissent* approved the product boycott carried on in the *Wohl* case. And the language of Mr. Justice Douglas, quoted by the district judge here and quoted in many anti-picketing opinions and briefs, was used in approval of the product boycott found to exist in the *Wohl* case.

The quotation taken from the concurring opinion of Mr. Justice Douglas in *Bakery Wagon Drivers v. Wohl, supra*, reads as follows:

"Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another.

quite irrespective of the nature of the ideas being disseminated. *Hence those aspects of picketing make it the subject of restrictive regulation.*" (R. 111-112, quoting from 315 U. S. at p. 776.)

The paragraph immediately following in the quoted opinion was omitted by the District Court, although it amounts to a definite qualification of the language reproduced, saying:

"*But* since 'dissemination of information concerning the facts of a labor dispute' is constitutionally protected, a State is not free to define 'labor dispute' so narrowly as to accomplish indirectly what it may not accomplish directly. That seems to me to be what New York has done here. Its statute (Civil Practice Act §867a) as construed and applied in effect eliminates communication of ideas through peaceful picketing in connection with a labor controversy arising out of the business of a certain class of retail bakers. But the statute is not a regulation of picketing *per se*, narrowly drawn, of general application, and regulating the use of the streets by all picketeers. In substance it merely sets apart a particular enterprise and frees it from all picketing. If the principles of the *Thornhill* case are to survive, I do not see how New York can be allowed to draw that line."

As a matter of fact, in the *Thornhill* case itself, the Court recognized "the power of the State to set the limits of permissible contest open to industrial combatants" but quickly added that "It does not follow that the state in dealing with the evils arising from industrial disputes may *impair* the *effective* exercise

of the right to discuss freely industrial relations which are matters of public concern”.

The authority of the *Wohl* decision in upholding on constitutional principles the right to conduct a product boycott is further emphasized in the *Ritter's Cafe* case, *supra*, decided the same day and reported at 315 U. S. 722. In that case the Supreme Court of the United States refused to interfere with action of the Courts of Texas in prohibiting picketing of a fully unionized cafe in a dispute over a construction job located one and a half miles distant. At page 727 of the opinion the Court goes to the trouble to reaffirm the *Wohl* case, decided on the same day, as illustrating the permissible limits of picketing. In other words, the ruling of the Court in the *Wohl* case, concurred in by Mr. Justice Douglas and by all the other justices who participated, is as far as possible from the implication of the District Court (R. 111) with reference to the “evils of the secondary boycott”. In other words, according to the ruling of the Supreme Court, a product boycott in the *Wohl* case was lawful and constitutional. Therefore, since the Constitution remains the same, the product boycott in the present case is lawful and constitutional, and the only argument that it is unlawful and unconstitutional must be based on the contention that in some way the Taft-Hartley Act is more potent than the Constitution itself.

As stated above, we contend that the provisions of Section 8(c) protects the pickets in their product boycott, if, in fact, they needed any statutory protection

in view of the explicit rulings of the Supreme Court of the United States and in the plain language of the First Amendment. In the light of the *Thornhill* decision and others which followed, the peaceful picketing constituted the "expressing" of "views, argument or opinion" and "dissemination thereof". If it be conceded or held that Section 8(c) is to be read in connection with the various provisions of Section 8(b), then Sections 8(b) and 8(c) in prohibiting acts which Congress may or may not have had the right under the Constitution to prohibit certainly do not prohibit the exercise of the right of free speech. Under that interpretation this portion of the statute may stand, but of course in that case the injunction cannot stand. The General Counsel, therefore, may have it either way. If he is willing to concede that Section 8(c) protects the right of free speech of the pickets as well as the employer, then he is not entitled to the injunction; while if he contends that Section 8(b) must be read without the protection of Section 8(c) and if he further contends that Section 8(b) must also be construed without the protection of the First Amendment, then those portions of Section 8(b) are clearly unconstitutional.

VIII.

SECTION 8(b)(4)(A) IS VOID FOR VAGUENESS
AND UNCERTAINTY.

A. The terms of Section 8(b)(4)(A), which are incorporated in the injunctive order herein appealed from almost verbatim, are violative of due process of law because they are vague, indefinite, and uncertain.

Mr. Justice Rutledge, concurring in the very recent decision in *United States v. Congress of Industrial Organizations, supra*, sets forth an extremely learned exposition of the principle of constitutional law indicating that “*blurred signposts*” to illegality, will not suffice to create it.

So far as the guarantees of the First Amendment are concerned, “* * * statutes restrictive of or purporting to place limits to those freedoms must be narrowly drawn to meet the precise evil the legislature seeks to curb” and “* * * the conduct proscribed must be defined specifically so that the person or persons affected remain secure and unrestrained in their rights to engage in activities not encompassed by the legislation”.

The District Court herein holds that Section 8(b)(4)(A) is not unconstitutionally vague or uncertain, citing *United States v. Petrillo*, 332 U. S. 1, 67 S. Ct. 1538, 91 L. Ed. 1403. (R. 109.) The statute there involved (Act of April 16, 1946, 60 Stat. 89, ch. 138, 47 U.S.C.A. §506) refers to “the use or express or implied threat of the use of force, violence, intimidation or duress or implied threat of the use of other means to coerce, compel or constrain” an employer to hire unneeded employees. In the *Petrillo* case, the Su-

preme Court pointed out that the "gist of the offense here charged in the statute and in the information" is that the defendant "willfully, by the use of force, intimidation, duress *and* by the use of other means did attempt to coerce, compel and constrain" the licensee to hire unneeded employees. (Italics are the Court's.)

All that was held in the *Petrillo* case was that if the allegations of the information that the prohibited result was attempted to be accomplished by picketing are so broad as to include peaceful constitutionally protected picketing, the trial Court would be free to strike them, or the Government could have amended the information, so that "this case had not reached a stage where the decision of a precise constitutional issue was a necessity".

In invalidating the California "Hot Cargo and Secondary Boycott Act" drawn in language comparable to Section 8(b)(4)(A), the Supreme Court of this State cited *Lanzetta v. New Jersey*, 306 U. S. 451, 59 S. Ct. 618, 81 L. Ed. 888, and numerous other United States Supreme Court decisions for the proposition that:

"Language prohibiting conduct that may be prohibited and conduct that may not affords no reasonably ascertainable standard of guilt and is therefore too uncertain and vague to be enforced." (*In re Blaney, supra*, 30 Cal. (2d) at p. 652; see also *In re Bell*, 19 Cal. (2d) 488, 495, 122 P. (2d) 22.)

A statute which declares unlawful the doing of an act in terms so vague that men of common intelligence

must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

Lanzetta v. New Jersey, supra;

Connally v. General Construction Company, 269

U. S. 385, 46 S. Ct. 126, 70 L. Ed. 322;

Herndon v. Lowry, 301 U. S. 242, 57 S. Ct. 732,

81 L. Ed. 1066.

The order for injunctive relief appealed from herein (R. 139-140) is couched in the statutory language almost verbatim, the sole change consisting of the addition of the words “by *picketing*, orders, force, threats *or* promise of benefit, *or* by any other like or related acts *or* conduct” to describe the proscribed methods of inducing or encouraging refusal to perform specified services by the employees of any employer.

Appellants submit that the language of Section 8(b) (4)(A) as incorporated in and amplified by the injunctive order in question (employing the disjunctive expression “*picketing or* orders, force, threats, etc.” as distinguished from the conjunctive) is so vague and uncertain as to amount to a denial of due process. (See Appellants’ Objections to Petitioner’s Proposed Injunction Order, R. 126-127; Reporter’s Transcript of Proceedings, dated February 13, 1948, R. 218-219, 228-230, 236-237.)

The following quotation from the opinion in the *Blaney* case is particularly applicable to the dilemma confronting appellants in the present case:

“While the instant statute does not directly impose criminal penalties, it does provide for injunc-

tive relief in the event of its violation and the penalty for disobeying an injunction is contempt of court. It is a coercive measure and *a person does not know in advance whether its application to his conduct will be constitutional or unconstitutional*. He should not be required at his peril to make that determination.” (30 Cal. (2d) at pp. 653-654.)

- B. The separability clause of Section 16 of the act in question cannot save Section 8(b)(4)(A) from being declared totally invalid.**

Section 16 of the amended National Labor Relations Act provides:

“If any provision of this Act, or the application of such provision to any person or circumstances shall be held invalid, the remainder of the Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.”

However, if there is no possibility of mechanical severance, as in the case of Section 8(b)(4)(A) where the language is so broad as to cover subjects within and without the legislative power, the general language of the statutory provision infringing upon the constitutional right of free speech leaves the Court with no alternative but to nullify the entire section.

Smith v. Cahoon, 283 U. S. 533, 563, 51 S. Ct. 582, 75 L. Ed. 1264;

In re Blaney, *supra*, 30 Cal. (2d) at pp. 653-656;

In re Porterfield, *supra*, 28 Cal. (2d) at p. 120;

In re Bell, *supra*, 19 Cal. (2d) at p. 498.

“The statute in question contains the provision that ‘If any provisions of this chapter, or the application of such provision to any persons or circumstance shall be held invalid, the remainder of this chapter, or the application of such provisions to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby’. (Lab. Code § 1136.) *That separability clause cannot save it* * * *

“By this type of provision, the Legislature has in effect sought to delegate to the courts the task of rewriting the statute, directing them to set forth, in a succession of judicial opinions upholding or annulling judgments enforcing the provisions of the act, thus determining in advance the extent to which the Legislature may go in providing regulations in this field.

“It is an inescapable result that, in the meantime, those individuals who guess correctly will be released by the courts, and those who guess incorrectly will be punished; but that *no one, employer, employee, union or any one will know what the law is until, after violation of the statute and judgment thereon, a higher court is given an opportunity to pass on the question of its validity as applied to the particular ‘person or circumstance’.*

“Such a theory of judicial construction cannot be supported on either practical or legal grounds.”
(*In re Blaney*, *supra*, 30 Cal. (2d) at pp. 653-656.)

IX.

THE APPLICATION OF SECTION 10(1) AND THE ORDER OF THE DISTRICT COURT HEREIN VIOLATE THE INHIBITION OF THE THIRTEENTH AMENDMENT AGAINST INVOLUNTARY SERVITUDE.

The District Court herein held that there was "no support whatever, under the record before us or within the provisions of the Act that are involved in this matter, for a finding or conclusion that the Thirteenth Amendment has been transgressed". It concluded that "*the inherent and statutory rights of employees, as such are preserved by the saving provisions in the Act * * **" (R. 108-109.)

The "saving provisions" quoted in this connection consist of Section 502 of the Labor Management Relations Act, 1947, which reads as follows:

"Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent or shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; *nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent*; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act."

Although the ineffectiveness of this same "saving provision", so-called, to avoid the imposition of involuntary servitude if the relief sought by appellee

herein should be granted was specifically pointed out to the District Court upon the argument of this matter (R. 177-178), an injunction was issued which by its terms:

“Ordered that Printing Specialties and Paper Converters Union, Local 388, AFL and Walter J. Turner and each of them and their agents, servants, employees and attorneys and *all persons in active concert or participation with them* be and hereby are *restrained and enjoined* pending final adjudication by the Board of this matter *from: Engaging in, or inducing or encouraging the employees of any employer, by picketing, orders, force, threats, or promises of benefit or by any other related acts or conduct to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities, or to perform any services, where an object thereof is forcing or requiring any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of, or to cease doing business with, Sealright Pacific Ltd.*” (R. 139-140.)

As emphasized above, the order runs against Local 388 and its secretary-treasurer, appellant Turner, “and their agents * * * and *all persons in active concert or participation with them*”.

“Agent” is defined by Section 2(13) of the amended Act so that “the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling” in the determination

of whether "any person is acting as an 'agent' of any other person". Section 2(1) defines "person" as including *inter alia* "labor organizations" and "associations". The term "participation" as used in the order is particularly significant in view of the definition of "labor organization" in Section 2(5) as a group "in which *employees participate*". It is perfectly obvious that the order runs to individual employees and not just to the legal fiction of a separate entity known as an unincorporated association.

The order restrains these individual employees from themselves "engaging in a strike or a concerted refusal" to work "in the course of their employment" for the proscribed purposes. *It enjoins concerted activities of union members as such*, including striking and picketing.

This injunctive order was designed to curtail the right of workingmen to combine for their mutual protection by restraining various concerted activities, including peaceful picketing and the boycott, thereby requiring involuntary servitude contrary to the Thirteenth Amendment.

Pollock v. Williams, 322 U. S. 4, 17, 18, 64 S. Ct. 792, 88 L. Ed. 1095;

Bailey v. Alabama, 219 U. S. 219;

American Federation of Labor v. McAdory, 246 Ala. 1, 18 So. (2d) 810;

Henderson v. Coleman, 150 Fla. 185, 7 So. (2d) 117;

In re Blaney, *supra*;

Stapleton v. Mitchell, 60 Fed. Supp. 51.

The order appealed from herein is directed against concerted activities of union members in the same fashion as the unconstitutional California "Hot Cargo and Secondary Boycott Act" which prohibited "any combination or agreement resulting in a refusal by employees to handle goods or to perform any services for their employer because of a dispute between some other employer and his employees or a labor organization" as well as "any combination or agreement to cease performing * * * any services for any employer * * * for the purpose of inducing or compelling such employer to refrain from doing business with, or handling the products of any other employer because of a dispute between the latter and his employees or a labor organization * * *" (Labor Code §1134, cited *supra*.) It was this restriction on the inherent rights of employees which was struck down as invalid by the *Blaney* decision in reaffirmation of earlier declarations of the California Courts that:

"It is now settled law that workmen may lawfully combine to exert various forms of economic pressure upon an employer, provided the object sought to be accomplished thereby has a reasonable relation to the betterment of labor conditions, and they act peaceably and honestly * * * This right is guaranteed by the federal Constitution * * * and it is not dependent upon the existence of a labor controversy between the employer and his employee." (*In re Lyons*, 27 Cal. App. (2d) 293, 81 P. (2d) 190.)

"Various means of economic suasion such as picketing, the primary and secondary boycotts, and refusal to work together, often go to make up

concerted efforts * * * Such conduct may be performed in the exercise of civil liberties, guaranteed by both our federal and state Constitutions.” (*In re Porterfield*, 28 Cal. (2d) 91, 114, 168 P. (2d) 706, 167 A.L.R. 675.)

Both state and federal courts have repeatedly recognized that attempts by government to prohibit a concerted refusal by union members to handle or work on non-union goods contravene the Thirteenth Amendment. In *Stapleton v. Mitchell*, 60 F. Supp. 51, a statutory three-judge Court composed of Circuit Judges Huxman and Murrah and District Judge Rice held unconstitutional Section 8(12) of the 1943 Kansas Labor Law (Session Laws of 1943, c. 191) which made it unlawful to “refuse to handle, install, use or work on particular materials or equipment and supplies because not produced, processed, or delivered by members of a labor organization”. Judge Murrah, speaking for the Court, said:

“The right to peaceably strike or to *participate* in one, to work or refuse to work, and to choose the terms and conditions under which one will work, like the right to make a speech, are fundamental human liberties which the state may not condition or abridge in the absence of grave and immediate danger to the community.”

The opinion in *Stapleton v. Mitchell* points out that the statute in question contained both a “saving clause” stating that “except as specifically provided in this Act, nothing therein shall be construed so as to interfere with, impede or diminish in any way the

right to strike or the right of individuals to work; or shall anything in this Act be construed to invade the right of freedom of speech" and "a *severability clause* to the effect that if any provision of the Act or the application thereof to any person or circumstance shall be held invalid, such invalidity shall not affect other provisions or applications of the Act * * *"

Neither the "saving clause", comparable to Section 502 of the Labor Management Relations Act, 1947, nor the "severability clause", comparable to Section 16 of the amended National Labor Relations Act and Section 503 of the full Taft-Hartley Act, could save Section 8(12) of the 1943 Kansas Labor Law from being invalidated as an unconstitutional imposition of involuntary servitude.

Employees have a constitutional right to leave employment singly or in concert, and consequently appellants cannot be guilty of unlawful conduct for causing them to do so. (See United States v. Petrillo, supra, where the Supreme Court indicated that it would pass upon the question of whether the application of the statute there in question violated the Thirteenth Amendment when it is "appropriately presented.")

X.

THE ATTEMPTS OF CONGRESS TO CONFER UPON THE DISTRICT COURT AND OF THE DISTRICT COURT TO PERFORM HEREIN AN ANCILLARY FUNCTION TO THE BOARD'S ADMINISTRATIVE DUTIES UNDER SECTION 10 OF THE AMENDED ACT VIOLATE ARTICLE III OF THE FEDERAL CONSTITUTION.

The District Court concluded herein that “* * * the specific injunctive processes expressly conferred upon this Court by Section 10(1) of the Act become operable upon the credible petition of the administrative agency as provided in the Act * * *” and therefore, “* * * this court should grant *an appropriate injunction Auxiliary to the proceedings in the Board* * * *” (R. 106-107.)

Thus, the Court below adopted the view contended for by the General Counsel of the National Labor Relations Board that its function in a proceeding under Section 10(1) is limited by Congress to the issuance of injunctions upon the application of Board agents as an ancillary remedy to assist the Board in exercising its exclusive power to adjudicate unfair labor practice charges. The District Court also accepted the General Counsel's argument that a Board agent has an absolute right to injunctive relief in proceedings such as the instant case conditioned only upon a determination that “reasonable cause” exists for his stated belief that an unfair labor practice has been committed; however, the Court is not entitled to require *prima facie* evidence of facts forming the basis for the Board agent's belief in making that determination.

The District Court has adopted the General Counsel's position that "the propriety of such injunctive relief turns not upon traditional equity criteria applicable in suits between private parties, but upon the necessity for effectuating the statutory policy" (R. 43) and that the showing necessary for an injunction against engaging in a strike or concerted refusal to work or "inducing or encouraging" others to do so need not be any greater than that required for an administrative agency to invoke the assistance of the Courts to enforce a subpoena issued in the course of an official investigation. (See *Endicott Johnson Corp. v. Perkins*, 317 U. S. 501 and other cases cited at R. 106.)

The District Court herein says that "in conformity to the rule enunciated by the Supreme Court in *Hecht Co. v. Bowles*, Admr., 321 U. S. 327, we have given appropriate consideration to all of the evidential material before the court". The fact is that the appellee did not present any evidential material to the Court, either by means of affidavits or direct testimony.

Actually, the District Court has rejected the authority of *Hecht Company v. Bowles*, 321 U. S. 327, 64 S. Ct. 587, 88 L. Ed. 754, which reversed a decision of the United States Circuit Court of Appeals for the District of Columbia holding that the administrator was entitled to injunctive relief as a matter of course under the Emergency Price Control Act. There Mr. Justice Douglas confirmed again the view that "An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion

which guides the determinations of courts of equity” saying “We do not believe such a *major departure* from that long tradition as is here proposed should be lightly implied.”

We respectfully submit that the District Court erred in rejecting appellants’ argument below that “the threat to free speech and assembly under Section 8(b)(4)(A) is heightened under [this] view of the limited discretion afforded this Court in performing an *ancillary function* to the Board’s adjudicative powers under Section 10.” (R. 57-60, commenting in detail on cases which were to be cited later in the memorandum opinion of the District Court.)

While Congress has great powers over inferior courts, it can only require them to exercise the power vested by Article III and cannot clothe them with non-judicial powers. (*Federal Radio Commission v. General Electric Co.*, 281 U. S. 464, 469, 74 L. Ed. 969.) Constitutional Courts cannot “exercise or participate in the exercise of functions which are essentially * * * administrative.”

Section 10(1) on its face violates the fundamental principle of *separation of powers* laid down by Article III of the Constitution with respect to the judiciary. This principle has been clearly summarized by the Attorney General’s Committee on Administrative Procedure, when it said:

“Federal courts created under Article III can be authorized only to decide ‘cases and controversies’ to use the constitutional phrase; and from an early day the Supreme Court has regarded

this restriction as an important one, to be scrupulously observed. 'Cases and controversies', broadly speaking, are matters in which a court can determine the rights of adverse parties by applying the law to the facts as found.'

(Sen. Doc. 8, 77th Cong., 1st Sess., p. 12.)

XI.

THE FINDINGS OF FACT SPECIFIED AS ERROR HEREIN ARE CONTRARY TO AND UNSUPPORTED BY THE EVIDENCE, AND OMIT MATERIAL UNCONTROVERTED FACTS ESTABLISHED BY THE RECORD.

The failure of the District Court to require the appellee to make even a *prima facie* showing of the purported facts which he claims to have reasonable cause to believe to be true and the obvious refusal to give any weight to the uncontroverted affidavit of Appellant Turner are apparent from a reading of the record.

The petition for injunction (R. 2-8) is not in reality a verified petition, since the only verification present is that of the regional director that he had reason to believe that certain acts took place and circumstances existed. No direct allegation or proof was offered in any manner whatsoever that the facts and incidents in question did occur. No witnesses and no affidavits were presented by appellee, and therefore it was error to make any findings of fact where such facts were not admitted or conceded by appellants.

The District Court accepted the proposed findings presented by the general counsel of the Board almost

without change, despite the detailed objections of appellants. (R. 120-127.)

Perhaps the most serious error has to do with the findings that the picketing activities herein complained of are characterized as inducing and encouraging conduct on the part of employees of the Los Angeles-Seattle Motor Express and West Coast Terminals Companies "*by orders, force, threats or promises of benefits*". (R. 136-137.)

As in the *Wohl* case, 315 U. S. at p. 776, the record here

"* * * does not contain the slightest suggestion of embarrassment in the task of governance; there are no findings and no circumstances from which we can draw the inference that the publication was attended or likely to be attended by violence, force or coercion or conduct otherwise unlawful or oppressive; and it is not indicated that there was an actual or threatened abuse of the right to free speech through the use of excessive picketing."

The absence of factual material to support the conclusion of law that the employees in question were induced or encouraged "*by orders, force, threats, or promises of benefits*" and the obvious inference that this language was simply inserted in the petition for the purpose of attempting to avoid the application of Section 8(c) were called to the attention of the District Court during argument. (R. 161 and 176.)

Moreover, during the course of that same argument, the attorney for the general counsel of the Board plainly stated:

"We do *not* assert that there has been any violence on the picket line, or that any threats have been made, any express threats have been made. *The picketing I think can be termed peaceful picketing* in the sense that there has been no violence on the picket line, no disturbance of any kind. Nevertheless we feel that this sort of picketing is a violation of Section 8(b)(4)(A) of the Act * * *." (R. 204.)

CONCLUSION.

In his speech before the Conference of Circuit and District Judges at New Orleans on June 4th, General Counsel Robert N. Denham personally sought to justify his interpretation of Section 8(b)(4)(A) by expounding the notion that:

"* * * in view of the *Duplex Deering* and *Bedford Stone Cutters* cases decided about 25 years ago, there should be no doubt that peaceful picketing in pursuit of a secondary * * * boycott does not enjoy constitutional protection."

(National Labor Relations Board Press Release R-87, p. 22.)

These decisions of a quarter century ago were rendered before the "modern trend of decision" identifying picketing with free speech and assembly. See the dissenting opinion of Mr. Justice Brandeis in the *Duplex* case, 254 U. S. 443, at 481, 41 S. Ct. 172, 65 L. Ed. 349, 16 A.L.R. 196, wherein he queried, "May not all with a common interest join in refusing to expend their labor upon articles whose very production constitutes an attack upon their standard of

living and the institution which they are convinced supports it?", and answered his own inquiry by saying, "* * * in refusing to work on materials which threatened it, the union was only refusing to aid in destroying itself." (Cf. R. 111, citing the *Duplex* case.)

This dissent and a similar opinion six years later in the *Bedford Stone Cutters* case, 274 U. S. 37, 47 S. Ct. 522, 71 L. Ed. 916, 54 A.L.R. 791, where he condemned legislative restrictions on the boycott as "an instrument for imposing restraints upon labor which reminds one of involuntary servitude", ultimately led to the identification of picketing with free speech in Mr. Justice Brandeis' majority opinion in *Senn's* case, *supra*, 301 U. S. 468.

These modern constitutional doctrines, such as that expressed by Chief Justice Stone in *United States v. Hutcheson*, 312 U. S. 219 at p. 243, 61 S. Ct. 463, 85 L. Ed. 788 (namely, "the publication unaccompanied by violence of a notice that the employer is unfair to organized labor * * * is an exercise of the right of free speech guaranteed by the First Amendment which cannot be made unlawful by Act of Congress") should not have been overlooked by the general counsel, nor by the District Court herein.

Dated, July 9, 1948.

Respectfully submitted,

ROBERT W. GILBERT,

CLARENCE E. TODD,

ALLAN L. SAPIRO,

Attorneys for Appellants.

No. 11894

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

PRINTING SPECIALTIES AND PAPER CONVERTERS UNION,
LOCAL 388, A. F. OF L., AND WALTER J. TURNER,
APPELLANTS

v.

HOWARD T. LeBARON, REGIONAL DIRECTOR OF THE
TWENTY-FIRST REGION OF THE NATIONAL LABOR
RELATIONS BOARD, ON BEHALF OF THE NATIONAL LABOR
RELATIONS BOARD, APPELLEE.

ON APPEAL FROM AN ORDER OF THE DISTRICT COURT OF THE
UNITED STATES FOR THE SOUTHERN DISTRICT OF CALI-
FORNIA, CENTRAL DIVISION

BRIEF FOR APPELLEE

ROBERT N. DENHAM,
General Counsel,

DAVID P. FINDLING,
Associate General Counsel,

WINTHROP A. JOHNS,
DOMINICK L. MANOLI,
ALBERT DREYER,

Attorneys,
National Labor Relations Board.

To be argued by
MR. MANOLI.

FILE

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11894

**PRINTING SPECIALTIES AND PAPER CONVERTERS UNION,
LOCAL 388, A. F. OF L. AND WALTER J. TURNER,
APPELLANTS**

v.

**HOWARD T. LeBARON, REGIONAL DIRECTOR OF THE
TWENTY-FIRST REGION OF THE NATIONAL LABOR
RELATIONS BOARD, APPELLEE**

*ON APPEAL FROM AN ORDER OF THE DISTRICT COURT OF THE
UNITED STATES FOR THE SOUTHERN DISTRICT OF CALI-
FORNIA, CENTRAL DIVISION*

BRIEF FOR APPELLEE

JURISDICTION

This is an appeal from an order of the District Court for the Southern District of California granting a petition filed on behalf of the National Labor Relations Board, herein referred to as the Board, by Howard T. LeBaron, the Regional Director for the Twenty-first Region of the Board, pursuant to Section 10 (1) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. A., 1947 Supp., Sec. 151, *et seq.*), herein referred to as the Act. The

order enjoins appellants from engaging in certain unfair labor practices as defined by Section 8 (b) (4) (A) of the Act, pending final adjudication of the matter by the Board (R. 139).¹ The order was entered on February 16, 1948 (R. 140). Notice of Appeal to this Court was filed on March 1, 1948 (R. 142). The opinion of the court below is reported at 75 F. Supp. 678.

Appellant Printing Specialties and Paper Converters Union, Local 388, A. F. of L., herein referred to as the Union, is a labor organization within the meaning of the Act, and has its principal office within the Southern District of California (R. 135). Appellant Walter J. Turner is an agent of the Union within the meaning of Sections 2 (13) and 10 (1) of the Act (R. 135). Both appellants are engaged in the Southern District of California in promoting and protecting the interests of the members of the Union (R. 135). The unfair labor practices charged were committed within the Southern District of California (R. 136-137).

As shown by the petition (R. 2, *et seq.*), the jurisdiction of the court below was based on Section 10 (1) of the Act. The jurisdiction of this Court is invoked under Sections 128 and 129 of the Judicial Code (28 U. S. C. 225 and 227).

STATUTE INVOLVED

The statutory provisions primarily involved are Sections 8 (b) (4) (A), 8 (c) and 10 (1) of the National

¹ References to the printed transcript of record are designated "R."

Labor Relations Act, as amended. These provisions are set forth in the Argument (*infra*, pp. 9-10, 11-12, 35).

STATEMENT OF THE CASE

The petition in the court below alleged that Sealright Pacific, Limited, herein referred to as Sealright, had filed a charge with the Board alleging that appellants had engaged in unfair labor practices within the meaning of Section 8 (b) (4) (A) of the Act and affecting commerce as defined in Sections 2 (6) and 2 (7); that the charge had been referred to appellee for investigation; and that, after making a preliminary investigation, appellee had reasonable cause to believe that the charge was true and that a complaint should issue. The petition prayed for an injunction restraining the unfair labor practices pending final adjudication by the Board (R. 2-9). Appellants moved to dismiss the petition on the ground that the provisions of the Act relied on were violative of the First, Fifth and Thirteenth Amendments to the Constitution (R. 10-11). The court below overruled appellants' motion and thereupon, on the basis of the substantially undisputed facts as set forth in the verified petition and an affidavit submitted by appellants in support of the motion to dismiss, entered its order granting the relief prayed (R 112, 133-142).

The verified petition and the affidavit submitted in support of the motion to dismiss, showed, without dispute, the following facts:

Sealright is engaged at Los Angeles, California, in the manufacture, sale, and distribution of paper food containers. In the course of its business it purchases

and causes to be transported to its Los Angeles plant from points outside California, various materials valued in excess of \$1,000,000 annually. It ships various products to points outside California valued in excess of \$500,000 annually (R. 4).

On November 3, 1947, the Union called a strike of its members employed by Sealright in support of its demands with respect to certain terms and conditions of employment (R. 23). Thereafter, appellant Turner, as Secretary-Treasurer of the Union, informed the Los Angeles-Seattle Motor Express, Inc., herein referred to as L. A.-Seattle), a common carrier which transported Sealright's products, that if L. A.-Seattle continued to handle Sealright's products, the Union would picket Sealright's products handled by L. A.-Seattle (R. 24). On November 14, 1947, representatives of the Union followed two trucks loaded with Sealright's products to the terminal of L. A.-Seattle and there formed a picket line around the two trucks (R. 25). The representatives of the Union forming the picket line informed the employees of L. A.-Seattle that the trucks contained "hot cargo" and told or requested them not to handle it (R. 25). As a result of the picketing the employees of L. A.-Seattle refused and continued to refuse to handle or transport Sealright's products (R. 5). On or about November 17, 1947, and thereafter, the Union also placed a picket line around three freight cars at the docks of the West Coast Terminals Company, herein referred to as West Coast, at Long Beach, California, upon which rolls of paper consigned to Sealright were

being loaded (R. 5, 25). As a result, the employees of West Coast likewise refused to handle the goods consigned to Sealright (R. 5-6). The purpose of the Union's conduct was to require L. A.-Seattle and West Coast to cease handling and transporting the goods and products of Sealright (R. 5-6, 24-26).

Upon the foregoing undisputed facts, the court below found that there was reasonable cause to believe that appellants had engaged in unfair labor practices within the meaning of Section 8 (b) (4) (A) of the Act, affecting commerce within the meaning of Section 2 (6) and (7) of the Act (R. 134). The court below also concluded that Section 8 (b) (4) (A) of the Act was not repugnant to the First, Fifth, or Thirteenth Amendments to the Constitution of the United States (R. 140). Accordingly, it overruled appellants' motion to dismiss the petition and issued an order enjoining appellants from (R. 139-140):

Engaging in, or inducing or encouraging, the employees of any employer, by picketing, orders, force, threats, or promises of benefit or by any other like or related acts or conduct to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, where an object thereof is forcing or requiring any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of, or to cease doing business with, Sealright Pacific, Ltd.

SUMMARY OF ARGUMENT

The instant case was initiated pursuant to Section 10 (1) of the Act. Section 10 (1) empowers the district courts of the United States to grant, upon application of the Board, such interlocutory injunctive relief as is just and proper pending determination by the Board of unfair labor practice charges filed under Section 8 (b) (4) of the Act, where there is reasonable cause to believe that such unfair labor practices are being committed. The court below properly found that there was reasonable cause to believe that appellants, by means of picketing, were, in violation of Section 8 (b) (4) (A) of the Act, inducing and encouraging the employees of L. A.-Seattle and West Coast to engage in a concerted refusal to handle or transport the goods of Sealright, an object thereof being to compel the former to cease doing business with the latter.

Neither Section 8 (b) (4) (A) of the Act, nor the order of the court below enjoining such conduct on the part of appellants, violates the constitutional guaranty against involuntary servitude. The Act and the order merely prohibit labor organizations or their agents from engaging in strikes or inciting employees to engage in strikes or concerted refusals to perform services for the stated object. Neither the Act nor the order of the court below requires employees to continue working against their will.

The Act, insofar as it enjoins picketing where used to induce or encourage employees to engage in a strike or concerted refusal to perform services for the ob-

jects enumerated therein, does not violate the constitutional guaranty of free speech but represents a valid exercise of the Congressional power over commerce. Congress may, in order to narrow the area of industrial conflict and protect the public interest in the free flow of commerce, illegalize picketing where it is utilized to conscript the employees of a neutral employer in order to bring pressure to bear upon an employer involved in a labor dispute. Congress may prohibit picketing for an unlawful purpose, without transgressing constitutional limitations.

Section 8 (b) (4) (A) of the Act draws no distinction between the incitation of employees to engage in a total strike or a "product boycott" in furtherance of the enumerated objectives. Such a distinction is not supported either by the Act itself or its legislative history.

Section 8 (b) (4) (A) of the Act cannot be successfully challenged on the ground that it is so vague and indefinite as to violate the due process provision of the Constitution. The statute furnishes an adequate guide as to what conduct is proscribed and is as specific as the nature of the problem permits.

The protection which Section 8 (c) of the Act extends to the expression of views, argument, or opinion which contain no threat of reprisal or force or promise of benefit does not immunize the picketing engaged in here by appellants. Picketing is more than speech; it is a coercive technique, possessing elements of compulsion. Apart from its coercive aspect in this sense, picketing implicitly contains a threat of reprisal

and a promise of benefit in that it is an appeal to all workers to make common cause with the picketing group with the promise that if they respond they will receive similar aid when the occasion arises and with the threat that if they ignore the appeal, they will be refused assistance when they are similarly situated. These elements of picketing satisfy the requirements of Section 8 (c) of the Act.

Section 10 (1) of the Act does not confer non-judicial functions on the district courts. A proceeding under Section 10 (1) is a case or controversy within the meaning of Article III of the Constitution.

ARGUMENT

Preliminary Statement: The statutory scheme pursuant to which the present proceedings were initiated in the court below

As already stated, these proceedings were initiated pursuant to the provisions of Section 10 (1) of the Act. The Act empowers the Board, upon the filing of appropriate charges, to issue, hear and determine complaints that employers or labor organizations have engaged in unfair labor practices within the meaning of the Act (Section 10 (a), (b) and (c) of the Act). Proceedings of this character, requiring as they do investigation, hearing and consideration of the alleged unfair labor practices, are necessarily protracted and time consuming. Congress believed that certain unfair labor practices committed by labor organizations gave, or tended to give, rise to such serious and unjustifiable interruptions to commerce that their continuation, pending adjudication by the Board, would result in

irreparable injury to the purposes of the Act.² Accordingly, in order to prevent such a frustration of the statutory purpose, Congress provided in Section 10 (1) of the Act that—

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4), (A), (B), or (C) of Section 8 (b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true, and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition, the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charg-

² S. Rep. No. 105, 80th Cong., 1st Sess., p. 8.

ing party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. Upon filing of any such petition, the courts shall cause notice thereof to be served upon any person involved in the charge, and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further*, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. * * *

The relief contemplated in Section 10 (1) of the Act, and herein prayed for and granted, is in the nature of an interlocutory injunction. It is limited to such time as may expire before the Board issues its final order with respect to the unfair labor practices charged. As in the case of traditional equity practice with respect to interlocutory relief,³ the prerequisite to the granting of the relief contemplated by Section

³ *Bowles v. Montgomery Ward & Co.*, 143 F. 2d 38, 42 (C. C. A. 7); *Colorado Eastern R. Co. v. Chicago, etc., Ry. Co.*, 141 F. 898, 901 (C. C. A. 8); *Sinclair Refining Co. v. Midland Oil Co.*, 55 F. 2d 42, 45 (C. C. A. 4); *Northwestern Stevedoring Co. v. Marshall*, 41 F. 2d 28, 29 (C. C. A. 9); *City of Louisville v. Louisville Home Telephone Co.*, 279 F. 949, 956 (C. C. A. 6); *United States v. Parrott*, 27 Fed. Cas. 417, 430, 435 (C. C. N. D. Cal.); *Eastern Texas R. Co. v. Railroad Commission*, 242 Fed. 300 (D. C. W. D. Texas).

10 (1) of the Act is a finding by the district court that there is reasonable cause to believe that a violation of the Act, as charged, has been committed, and that equitable relief would be "just and proper." The court is not called upon to decide whether in fact the charges are true or whether in fact a violation has been committed. The ultimate determination of the truth of the charges and the existence of a violation is reserved exclusively to the Board, subject to review by the circuit courts of appeals pursuant to Section 10 (e) and (f) of the Act.⁴

I

The District Court properly found that there is reasonable cause to believe that appellants have, as charged, engaged in unfair labor practices in violation of Section 8 (b) (4) (A) of the Act

Section 8 (b) (4) (A) of the Act provides, in part, that:

(b) It shall be an unfair labor practice for a labor organization or its agents—

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is:

⁴ *Douds v. Teamsters Union Local 294*, 75 F. Supp. 414 (N. D. N. Y.); *Styles v. Local 74*, 74 F. Supp. 499 (E. D. Tenn.); *Douds v. Wine, Liquor & Distillery Workers Union Local 1*, 75 F. Supp. 447 (S. D. N. Y.); *LeBaron v. Printing Specialties and Paper Converters Union, Local 388*, 75 F. Supp. 678 (S. D. Calif.); Cf. *Evans v. International Typographical Union, et al.*, 76 F. Supp. 881 (S. D. Ind.).

(A) forcing or requiring * * * any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person.

The undisputed evidence summarized above fully supports the holding of the court below that there is reasonable cause to believe that (R. 136):

(d) On about November 14, 1947, representatives of [the Union] followed two trucks loaded with Sealright's products to the L. A.-Seattle terminal where by forming a picket line around two trucks containing the products of Sealright and telling the employees that the trucks contained "hot cargo" and not to "handle it," induced and encouraged the employees of L. A.-Seattle, by orders, force, threats or promises of benefits, not to transport or handle the goods of Sealright. After November 14, as a result of the above conduct of [the Union] the employees of L. A.-Seattle refused to transport or handle the goods of Sealright. [The Union] engaged in the foregoing conduct to force or require L. A.-Seattle to cease handling or transporting the products of Sealright.

* * * * *

(f) On November 17, 1947, while employees of West Coast were engaged in loading the rolls of paper onto freight cars consigned to Sealright in Los Angeles, a group of pickets representing [the Union] appeared at the docks of West Coast and, by forming a picket line around the freight cars being loaded with rolls

of paper for Sealright, induced and encouraged the employees of West Coast, by orders, force, threats or promises of benefits, not to handle or work on the paper consigned to Sealright. Since November 17, 1947, as a result of the above conduct of [the Union] and the continued picketing by [the Union] of the docks of the West Coast, the employees of West Coast have refused to handle or work on the goods consigned to Sealright. [The Union] engaged in the foregoing conduct in order to force or require West Coast to cease handling or transporting the products of Sealright.

It is clear, we submit, that appellants' conduct, summarized above, clearly falls within the proscription of Section 8 (b) (4) (A) of the Act and constitutes an unfair labor practice within the meaning of that section. Plainly, appellants did, in the language of Section 8 (b) (4) (A) of the Act—

* * * induce and encourage [by picketing] the employees of any employer [L. A.-Seattle and West Coast] to engage in a strike or a concerted refusal in the course of their employment to * * * transport or otherwise handle or work on any goods, articles, materials or commodities or to perform any services [for L. A.-Seattle and West Coast] where an object thereof is (A) forcing or requiring any employer [L. A.-Seattle and West Coast] * * * to cease * * * handling, transporting * * * or otherwise dealing in the products of any other producer, processor or manufacturer [Sealright], or to cease doing business with any other person [Sealright].

Accordingly, a clear basis for granting the relief required under the Act is established unless, as appellants' argue (1) Section 8 (b) (4) (A) of the Act violates either the First, Fifth or Thirteenth Amendments to the Constitution, or (2) appellants' conduct is privileged under Section 8 (c) of the Act, or (3) the provisions of the Act conferring jurisdiction on the district courts to grant interlocutory relief are invalid under Article III of the Constitution. We discuss these contentions below.

II

Section 8 (b) (4) (A) of the Act and the order of the court below based thereon do not invade any constitutional rights of appellants

1. The nature of the evil dealt with by Congress in Section 8 (b) (4) (A) of the Act

In 1935, the 74th Congress, which enacted the National Labor Relations Act, found that the denial by employers of the right of employees to organize for purposes of collective bargaining with respect to wages and other conditions of employment led to industrial strife which burdened and obstructed commerce. In order to eliminate this prolific source of industrial unrest and thereby promote the free flow of commerce, Congress, by enactment of the statute, sought to protect against employer interference the exercise by workers of full freedom of association and self-organization for purposes of collective bargaining and other mutual aid and protection. The constitutionality of the statute was upheld in *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1.

Under the aegis of the statute labor organizations grew in strength and power.⁵ Twelve years of experience under the National Labor Relations Act led the 80th Congress to conclude in 1947 that certain practices by labor organizations, whose growth and power had been in no small measure promoted and strengthened by the statute, were also a prolific source of widespread industrial unrest and seriously obstructed interstate commerce and impaired the interest of the public in the free flow of such commerce. One of these disruptive practices was the so-called labor secondary boycott. On the basis of the personal experience and observations of its members as well as extensive testimony before Congressional committees, the 80th Congress concluded that such boycotts, extending, as they do, labor-management disputes beyond the plant or company where the dispute originally arose to other employers or companies who are not directly involved in, and are powerless to correct, the basic dispute, were a serious threat to the well-being of the Nation.⁶

⁵ Peterson, Florence, *Survey of Labor Economics*, pp. 493-494 (1947). The membership of unions in this country was placed at 4,000,000 in 1935 (*ibid.*). By 1947 this membership, according to a press release, dated December 1947, issued by the U. S. Department of Labor, had increased to approximately 15,500,000.

⁶ Hearings before Senate Committee on Labor and Public Welfare, 80th Cong., 1st Sess., pp. 59-63, 969, 1496-1497, 1717-1718, 1732-1733, 1801, 2060-2061, 2148; Hearings before House Committee on Education and Labor, 80th Cong., 1st Sess., pp. 467-477, 539, 547-548, 549, 1001-1002, 1860, 1876, 2149-2150, 2530, 2547, 2572-2586, 2690; S. Rept. No. 105, 80th Cong., 1st Sess., pp. 7-8; H. Rept. No. 245, 80th Cong., 1st Sess., pp. 4-5, 23-24; 93 Cong.

Experience also demonstrated, as the legislative hearings show, that one of the most effective devices for achieving such boycotts was the picket line placed at the plant of an employer who, while not himself involved in a labor dispute, did business with an employer who was involved in such a dispute. Congress found that by means of such picketing labor organizations had sought to induce and encourage employees of neutral employers to strike or to engage in concerted refusals to perform services in the course of their employment and thereby compel their employer to cease transporting or handling or otherwise dealing in the products of, or otherwise doing business with, the employer involved in the labor dispute.

The effectiveness of picketing in achieving these objectives, as Congress was informed, is notorious. Union workers simply do not, save in exceptional circumstances, cross a picket line. The attention of Congress was directed to numerous instances where important segments of the Nation's economy had been seriously disrupted as a result of picketing in furtherance of such boycotts.⁷ Congress believed that such activities represented a potentially far-reaching threat to the economic well being of the Nation, particularly in view of the extensive unionization of employees occurring since the passage of the National Labor Relations Act in 1935 and the consequent power

Rec. 1910, A 1099, A 1296, 3560, A 2012, 3950, 3954, 4323, 4492, 5038, A 2378. References to the Congressional Record throughout this brief are to the daily Congressional Record and not to the bound volumes.

⁷ See note 6, *supra*.

wielded by labor organizations. As Senator Taft, one of the sponsors of the Act, pointed out in the course of the legislative debate on the bill which became the Act, the incitation of employees by labor organizations to engage in strikes or concerted refusals to handle goods or perform services in the course of their employment for the purpose of compelling an employer to cease doing business with an employer who is involved in a labor dispute can bring about a "chain reaction that will tie up the entire United States in a series of sympathetic strikes * * *."⁸

The enactment of this section of the Act represents therefore a deliberate legislative judgment and purpose to protect the interest of the public in the free flow of commerce by limiting the area of unrestricted industrial warfare and confining it to the extent provided by the section to the employer or company whose employees are directly involved in a labor dispute.

2. Section 8 (b) (4) (A) of the Act and the order of the court below do not infringe upon the constitutional guaranties of freedom of speech, due process or freedom from involuntary servitude

Appellants contend that Section 8 (b) (4) (A) of the Act and the order of the court below, insofar as they purport to enjoin picketing in furtherance of the objectives proscribed by the Act, are an invasion of the First Amendment's guarantee of freedom of speech, the Fifth Amendment's guaranty of due process, and the Thirteenth Amendment's prohibition of involuntary servitude. We submit that no constitu-

⁸ 93 Cong. Rec. 4323.

tional infirmity attaches either to Section 8 (b) (4) (A) of the Act as construed by the court below, or to the order of that court.

(a) The instant case presents no invasion of the guarantee against involuntary servitude

At the outset it is important to define the precise boundaries of the issues presented in the instant case. Section 8 (b) (4) (A) of the Act is an exercise of the power of Congress to eliminate interruptions to interstate commerce, whatever their source. *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1. The power to regulate commerce is "the power to enact 'all appropriate legislation' for its 'protection or advancement' * * *; to adopt measures 'to promote its growth and insure its safety' * * *; to 'foster, protect, control and restrain' * * *. That power is plenary and may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it.' " *Jones & Laughlin case*, *supra*, pp. 37-38. In the exercise of this plenary power, Congress, just as it may constitutionally regulate employer practices giving rise to labor disputes affecting commerce (*Jones & Laughlin case*, *supra*), may also regulate the activities of labor organizations where those activities interfere with or restrain the free flow of commerce. *Texas & N. O. Ry. Co. v. Brotherhood*, 281 U. S. 548; *Wilson v. New*, 243 U. S. 332; *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 488; *United States v. Hutcheson*, 312 U. S. 219, 232; *Allen Bradley Co. v. Local Union, No. 3*, 325 U. S. 797, 810.

Contrary to appellants' contention (Br. 76-81), no question arises here as to the right of employees to quit work or to work on any terms they may themselves choose. The statute does not make it an unfair labor practice for employees to cease work for any purpose.⁹ Employees as such are not subject to the unfair labor practices provisions of the Act. The limitation prescribed by Section 8 (b) (4) (A) of the Act is imposed upon *labor organizations* and their agents and the statute makes it an unfair labor practice for a *labor organization* or its agents to engage in a strike or to induce or encourage employees in the course of their employment to engage in a concerted refusal to perform services for the objectives enumerated in the Act. In conformity with these provisions of the Act, the order of the court below enjoins appellants and their agents (not employees as such) from engaging in conduct violative of Section 8 (b) (4) (A) of the statute.

Thus, it is clear that Congress has precluded any possible successful challenge to Section 8 (b) (4) (A) of the Act, or court orders based thereon, which might be predicated upon the Thirteenth Amendment. No

⁹ Section 502 of the Act specifically provides:

"Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act."

claim can be made that to restrain a labor organization from inducing or encouraging employees to engage in a strike or a concerted refusal to perform services in the course of their employment is a violation of the guarantee against involuntary servitude. Indeed, the Supreme Court recently brushed aside such a contention tersely as being "without merit." *United States v. United Mine Workers*, 330 U. S. 258. And in *Dorchy v. Kansas*, 272 U. S. 306, at p. 311, the Court, speaking through Mr. Justice Brandeis, implicitly rejected such a contention when it declared "* * * and it [the legislature] may subject to punishment him who uses the power or influence incident to his office in a union to order the strike."

The order entered herein is wholly consistent with the foregoing principles. It enjoins appellant Union and its agent from engaging in the unfair labor practices charged. Insofar as the order runs against all persons in active concert or participation with them, the order does no more than bind appellants and "those identified with them in interest, in 'privity' with them, represented by them or subject to their control. In essence, it is that [appellants] may not nullify [the order] by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding." *Regal Knitwear Company v. N. L. R. B.*, 324 U. S. 9, 14. Nothing contained in the order enjoins employees from quitting work.

Moreover, apart from the foregoing considerations, it is well settled that the constitutional privilege

against involuntary servitude is essentially a personal one (*Slaughterhouse* cases, 83 U. S. 36, 39), belonging here to the individual employees who have been induced by appellants to engage in a concerted refusal to perform services. Accordingly, the privilege, even if it were involved, which it is not, could be invoked solely by them and not by appellants on their behalf. Cf. *United States v. White*, 322 U. S. 694, 705.

(b) Congress may constitutionally prohibit peaceful picketing to induce strikes or concerted refusals to perform services in furtherance of secondary boycotts

Appellants' principal contention is, in substance (Br. 27-52), that Section 8 (b) (4) (A) of the Act, and the order of the court below, insofar as they enjoin appellants from inducing or encouraging, by picketing, employees to engage in strikes or concerted refusals to perform services, for the objectives set forth in the Act, violate the constitutional guaranty of free speech.

The Supreme Court has said that peaceful picketing as a means of communicating the facts of a labor dispute "may be a phase of the constitutional right of free utterance." *Carpenters Union v. Ritters' Cafe*, 315 U. S. 722, 727. But the Supreme Court has also said, in substance, that this does not mean, and has never meant, that "A state is * * * required to tolerate in all places and all circumstances even peaceful picketing by an individual." *Bakery Drivers Local v. Wohl*, 315 U. S. 769, 775. For, as Mr. Justice Douglas pointed out in his concurring opinion in the *Wohl* case (315 U. S., at pp. 776-777):

Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation.

It is clear that the assimilation of picketing to speech does not mean that picketing, however peaceful, is wholly immune from regulation by the community in order to protect the general welfare. The community still has power to confine the use of this weapon of industrial combat, as the Supreme Court has recognized it to be, within reasonable bounds. And the community may, for the purpose of advancing and protecting the public interest and without infringing constitutional guaranties, confine "the sphere of communication" and thereby localize industrial warfare. As pointed out by the Supreme Court in the *Ritter* case, *supra* (at pp. 724-727, 727-728).

The economic contest between employer and employee has never concerned merely the immediate disputants. The clash of such conflicting interests inevitably implicates the well being of the community. Society has therefore been compelled to throw its weight into the contest. The law has undertaken to balance the effort of the employer to carry on his business free from the interference of others against the effort of labor to further its economic self interest. And every intervention of government in this struggle has in some respect abridged

the freedom of action of one or the other or both.

The task of mediating between these competing interests has, until recently, been left largely to judicial lawmaking and not to legislation. "Courts were required, in the absence of legislation, to determine what the public welfare demanded;—whether it would not be best subserved by leaving the contestants free to resort to any means not involving a breach of the peace or injury to tangible property, whether it was consistent with the public interest that the contestants should be permitted to invoke the aid of others not directly interested in the matter in controversy; and to what extent incidental injury to persons not parties to the controversy should be held justifiable." Mr. Justice Brandeis in *Truax v. Corrigan*, 257 U. S. 312, 363. The right of the state to determine whether the common interest is best served by imposing some restrictions upon the use of weapons for inflicting economic injury in the struggle of conflicting industrial forces has not previously been doubted.

* * * * *

Where, as here, claims on behalf of free speech are met with claims on behalf of the authority of the state to impose reasonable regulations for the protection of the community as a whole, the duty of this Court is plain. Whenever state action is challenged as a denial of "liberty," the question always is whether the state has violated "the essential attributes of that liberty" * * * While the right of free speech is embodied in the liberty, safeguarded

by the Due Process Clause, that Clause postulates the authority of the states to translate into law local policies "to promote the health, safety, morals and general welfare of its people. * * * The limits of this sovereign power must always be determined with appropriate regard to the particular subject of its exercise."

* * * * *

It is true that by peaceful picketing workingmen communicate their grievances. As a means of communicating the facts of a labor dispute, peaceful picketing may be a phase of the constitutional right of free utterance. But recognition of peaceful picketing as an exercise of free speech does not imply that the states must be without power to confine the sphere of communication to that directly related to the dispute.

* * * * *

We must be mindful that "the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants." *Thornhill v. Alabama*, 310 U. S. 88, 103-04.

In enacting Section 8 (b) (4) (A) of the statute, Congress carefully balanced and weighed the conflicting interests of labor to further its economic self-interest, of the employer to carry on his business free from interference of others, and, particularly, of the public in the free and unrestricted flow of commerce.

It found, as already stated, that strikes in furtherance of boycotts of the type proscribed by the Act were, particularly in the aggregate, a substantive evil of sufficient magnitude as seriously to interfere with and restrain commerce and impair the national well-being. Accordingly, Congress concluded that the national interest made imperative the narrowing of the area of industrial conflict by the elimination of strikes to further such boycotts. It therefore made it an unfair labor practice for a labor organization, through the device of, *inter alia*, picketing, to conscript the aid of employees, and through them, of their employers, who were not directly concerned in the labor dispute precipitating such picketing, in order to bring pressure to bear upon the employer directly involved in the dispute. That is to say, Congress deemed it desirable and essential for the protection of the community as a whole "to insulate from the dispute" (*Ritter* case, *supra*), in the manner and to the extent provided in the statute, employees and employers who were not directly involved therein. Such a legislative judgment on a matter of serious controversial¹⁰ public policy must "weigh heavily in any challenge of the law as infringing constitutional limitations." *Cantwell v. Connecticut*, 310 U. S. 296, 307-308. The

¹⁰ The Supreme Court has frequently pointed out that the legislative judgment with respect to matters of public policy, particularly those of a highly controversial nature, is entitled to great weight in determining the constitutionality of legislation. See e. g. *United States v. Carolene Products Co.*, 304 U. S. 144, 154; *Hebe Company v. Shaw*, 248 U. S. 297, 303; *Block v. Hirsh*, 256 U. S. 135, 154.

means chosen by Congress to achieve its purposes are "appropriate to the permissible end." *Virginia Ry. Co. v. System Federation*, 300 U. S. 515, 558. And, we submit, the limitations imposed upon picketing by Section 8 (b) (4) (A) of the Act are a proper instance of the power of Congress, in the exercise of its plenary control over commerce and for the protection of the community as a whole, "to set the limits of permissible contest open to industrial combatants." *Thornhill v. Alabama*, 310 U. S. 88, at pp. 103-104.¹¹

These limitations, as applied here, in no way encroach upon " 'the essential attributes' " (*Ritter* case, *supra*) of the right of Sealright employees or their representatives, to inform the public of the facts of their dispute with their employer. Appellants are left free to use the "traditional modes of communication" other than picketing the business places of neutral employers, such as

¹¹ The circumstance that the restriction upheld in a case like the *Ritter* case represents an exercise of the police power of a State and that the restriction here in question is an exercise of the Congressional power over commerce is of no significance. Cf. *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146 where the Court stated (at pp. 156-157):

"That the United States lacks the police power, and that this was reserved to the States by the Tenth Amendment, is true. But it is none the less true that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State of its police power, or that it may tend to accomplish a similar purpose. * * * The war power of the United States, like its other powers, and like the police power of the States, is subject to applicable constitutional limitations * * *; but the Fifth Amendment imposes in this respect no greater limitation upon the national power than does the Fourteenth Amendment upon state power."

L. A.-Seattle and West Coast, for the purpose of publicizing their grievances with their real adversary, namely Sealright. Cf. *Ritter* case, *supra*, pp. 727-728. The instant case does not present the "unlimited ban on free communication," "baldly prohibiting all picketing" (*Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U. S. 287, 297), which impelled the Supreme Court to strike down the anti-picketing statutes involved in *Thornhill v. Alabama*, *supra*, and *Carlson v. California*, 310 U. S. 106. Nor is the instant case one where because of peculiar circumstances, such as were found to exist in the *Wohl* case, *supra*, it is impossible for appellants to publicize their legitimate grievances except by picketing the premises of employers who are not immediately concerned in the labor dispute. And this is not an instance where, as in *Cafeteria Employees Union, Local 302 v. Angelos*, 320 U. S. 293, or *American Federation of Labor v. Swing*, 312 U. S. 321, the "right of free communication * * * [has] been mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ." (*Swing* case, at p. 326). Neither appellants nor the workers whom they represent have any dispute with either L. A.-Seattle or West Coast "against which they are seeking to enlist public opinion" (*Swing* case, *supra*, p. 326).

(c) Picketing for an unlawful purpose is not protected by the Constitution

The fact that peaceful picketing may as a form of speech be protected by the Constitution does not mean that Congress cannot proscribe such picketing when carried on, as here, for an unlawful purpose. Section 8 (b) (4) (A) of the Act, in substance, prohibits

labor organizations from engaging in strikes or inducing or encouraging employees to engage in strikes where an object thereof is to bring about a secondary boycott of an employer with whom the labor organization in question has a dispute. This is precisely what appellants sought to do in the instant case. The picket line which appellants established at the terminals of L. A.-Seattle and West Coast was calculated to induce and encourage the employees of those carriers, with whom appellants, or the employees they represent, had no dispute, to refrain from performing services for them with a view to compelling the carriers to cease doing business with Sealright.

The power of Congress to proscribe secondary boycotts such as are denounced by Section 8 (b) (4) (A) of the Act cannot be questioned. *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418; *Loewe v. Lawlor*, 208 U. S. 274; *Duplex Printing Press Co. v. Deering*, 254 U. S. 493; *Bedford Cut Stone Co. v. Journeymen Stone Cutters Ass'n.*, 274 U. S. 37; *Allen Bradley Co. v. Local Union No. 3*, 325 U. S. 797; *United Brotherhood of Carpenters and Joiners of America v. United States*, 330 U. S. 395.

It is well established that peaceful picketing for an unlawful objective is illegal and may be enjoined.¹² This rule has not been changed by the recent decisions of the Supreme Court. In *Allen Bradley Co., v. Local Union, No. 3*, 325 U. S. 797, the Supreme Court sustained an injunction against peaceful picketing by a labor union the purpose of which was to maintain

¹² Teller, L., *Labor Disputes and Collective Bargaining*, Sections 113-114.

a monopoly in violation of the Sherman Act. In that case, the union had a monopoly on the manufacture and installation of electrical equipment from New York City.¹³ In order to maintain its monopoly, the union, by agreement with employers in the New York area, required manufactured equipment brought into New York to be unwired and rewired by its members before installation. This objective was accomplished "by the traditional labor weapons of refusal to work upon disfavored goods, with peaceful and non-violent persuasion, picketing, and blacklisting, and now the active participation of the local employers" (145 F. 2d, at p. 219). There was "a specific finding that there was no evidence of any violence or any threat of violence against any of the plaintiffs by any of the defendants" (145 F. 2d, at p. 219 n.).

The Supreme Court held the conduct of the union unlawful under the Sherman Act because of the association with nonlabor groups. It required the district court to modify its injunction, which had restrained peaceful picketing, boycotting, and striking, "so as to enjoin only those prohibited activities in which the union engaged in combination with any person, firm, or corporation which is a non-labor group * * *" (325 U. S., p. 812), but it left the injunction intact otherwise. The Court thus clearly sanctioned an injunction which forbade peaceful picketing by a union for an unlawful purpose. The fac-

¹³ This statement of the case is taken both from the Supreme Court's opinion and from the opinion of the Circuit Court of Appeals (145 F. 2d 215) to which the Supreme Court referred (325 U. S., at p. 798) for a more detailed statement of the facts.

tor of employer cooperation, though of importance under the Sherman Act, clearly has no constitutional significance. The opinion recognizes this in replying to the criticism contained in Mr. Justice Roberts' separate opinion that its holding meant that a union could accomplish the same end if it did not act in combination with business groups. In this connection the opinion states (325 U. S., at p. 810):

This, it is argued, brings about a wholly undesirable result—one which leaves labor unions free to engage in conduct which restrains trade. But the desirability of such an exemption of labor unions is a question for the determination of Congress. *Apex Hosiery Co. v. Leader*, *supra*.

Numerous state supreme courts have held that peaceful picketing for an unlawful purpose may be prohibited. Typical of these holdings is the decision of the Oregon Supreme Court in *Peters v. Central Labor Council*, 169 P. 2d 870, where the court stated (at p. 874):

* * * It is significant that in those cases where the Supreme Court [of the United States] identified picketing with free speech no unlawful purpose of the picketing was involved. That courts may take into consideration the purpose of the picketing is established by the great weight of authority.

Accord: *Employment Relations Board v. Milk and Cream Drivers Employees Union*, 238 Wis. 379, 299 N. W. 31, cert. denied 316 U. S. 668 (1941); *Northwestern Pacific R. R. Co. v. Lumber & Sawmill Work-*

ers' Union, 31 A. C. 448, 189 P. 2d 277 (Calif. 1948); *Lafayette Productions v. Ferentz*, 305 Mich. 193, 9 N. W. 2d 57 (1943); *Harper v. Brennan*, 311 Mich. 489, 18 N. W. 2d 905 (1942); *Fred Wolferman, Inc. v. Root*, 204 S. W. 2d 733 (Mo.), cert. denied 68 S. Ct. 608 (1948); *Colonial Press, Inc. v. Ellis*, 321 Mass. 495, 501, 74 N. E. 2d 1 (1947); *Florsheim Shoe Store Co. v. Retail Shoe Store Union*, 288 N. Y. 188, 42 N. E. 2d 480 (1942); *Bloedel-Donovan Lumber Mills v. International Woodworkers*, 4 Wash. 2d 62, 102 P. 2d 270 (1940).¹⁴

Whether Congress could prohibit all peaceful picketing by declaring all labor objectives unlawful is a question that is not presented by this case. For, as said by Judge Learned Hand in a case that has often been cited, "most constitutional problems in the end resolve themselves into the question, How far? and there is no royal road to their solution by rhetorically conjuring up outrageous possibilities which may arise from their unflinching application." *Dryfoos v. Edwards*, 284 F. 596, 600 (S. D. N. Y.), aff. 251 U. S. 146. See also, *Noble State Bank v. Haskell*, 219 U. S. 104, 113. It is enough for the purposes of this case that Congress has the unquestioned power to make

¹⁴ See also Dodd, *Picketing and Free Speech: A Dissent*, 56 Harv. L. Rev. 513 (at p. 524):

"* * * Picketing is, however, more than the statement of a case. * * * When made use of by strikers, it is an express or implied invitation to the public to aid the strikers by refraining from dealing with their employer. If the concerted action of the strikers is unlawful by reason of its purpose, it would be difficult to uphold the contention that they have a constitutional right to attempt to urge others to assist them in accomplishing that purpose."

unlawful strikes to further secondary boycotts such as those denounced by Section 8 (b) (4) (A) of the Act. See cases, *supra*, p. 28.

Appellants contend that in any event Section 8 (b) (4) (A) of the Act was not intended to prohibit conduct of the type enjoined by the court below. Specifically, appellants argue (Br. 53-57) that the legislative history of Section 8 (b) (4) (A) shows that the application of that section is confined to such secondary boycotts as involve "full scale economic sanctions * * * by a union against an employer with whom no dispute exists for the purpose of compelling him to shun commercially the firm where the primary dispute exists" and that the Act was not intended to proscribe "picketing the products of the struck plant."

The Act itself draws no such line of distinction. It makes it an unfair labor practice for a labor organization or its agents to induce or encourage employees to engage in a concerted refusal in the course of their employment to process, transport, or otherwise handle or work on any goods for the enumerated objectives. The Act, by its express terms, prohibits the incitation of employees by labor organizations to engage either in a total strike or what may be termed a partial strike in furtherance of the objectives set forth in Section 8 (b) (4) (A).

Nor does the legislative history of the Act suggest that Congress intended any such distinction. On the contrary, it is apparent that Congress, aware that differentiations of that nature were being urged, declined to draw such a line. Thus, in the course of the

legislative debate on the bill, Senator Taft, one of its sponsors, explaining Section 8 (b) (4) (A), stated:¹⁵

* * * we are dealing with the checking of deliveries through secondary boycotts or jurisdictional strikes. * * * The trouble is that the man drives up to the delivery point, and because the teamsters' union says that he does not have a teamsters' card, then the union in the plant, the unloaders or longshoremen, or whatever they may be will not unload his truck. That is what we are trying to reach in this case.

Again, in answer to the objection contained in the President's veto message that the bill indiscriminately outlawed all secondary boycotts,¹⁶ Senator Taft said:¹⁷

There was no testimony in the record anywhere to the effect that secondary boycotts and jurisdictional strikes were justified. We asked the President's representatives as to what kinds of secondary boycotts were justified, but we never got a satisfactory answer.

It is evident from the foregoing that Congress did not intend to make any distinction between what appellants characterize as a "full scale secondary boycott" and a "product boycott."

Moreover, such a distinction would be wholly inconsistent with the basic purpose of Section 8 (b) (4) (A) of the Act. As already shown, Congress sought to remove the impediments to the free flow of commerce which resulted from the incitation of the em-

¹⁵ 93 Cong. Rec. 5069.

¹⁶ 93 Cong. Rec. 7500, 7501.

¹⁷ 93 Cong. Rec. 7690.

ployees of a neutral employer to engage in a concerted refusal, among other things, to handle or work on any goods or perform any services in order to bring pressure to bear upon an employer engaged in a labor dispute. Whether employees of the neutral employer engage in a total strike or in a "product boycott," the effect upon the free flow of commerce is the same, differing only in degree.

(d) Section 8 (b) (4) (A) of the Act does not violate the Fifth Amendment's guaranty of due process

Appellants contend (Br. 71-74) that Section 8 (b) (4) (A) of the Act, insofar as it prohibits labor organizations from inducing or encouraging employees to engage in strikes for the enumerated purposes, is so vague and indefinite as to be violative of the due process guaranty of the Fifth Amendment. In support of this argument appellants invoke the rule applicable to penal statutes that where such a statute is so vague and indefinite that men of common intelligence must necessarily speculate as to its meaning it is unconstitutional. Such a strict test has, of course, no application to the Act, for it is well established that the "standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement." *Winters v. New York*, 333 U. S. 507, 515.

But whatever the applicable test, Section 8 (b) (4) (A) is, we submit, immune to successful challenge upon the ground of vagueness or indefiniteness. As more fully stated below (pp. 35-36), Section 8 (b) (4) (A) must be read in conjunction with Section 8 (c) of the

statute. So read, Section 8 (b) (4) (A) provides that it shall be an unfair labor practice for a labor organization to engage in a strike or to induce or encourage, *by threat of reprisal or force or promise of benefit*, the employees of any employer to engage in a strike or concerted refusal, *et cetera*. Assuming for the sake of argument that Section 8 (b) (4) (A) standing alone might be invalid because of vagueness, the addition of the underscored qualification plainly leaves no room for doubt as to its meaning. The language thus used is as specific as the nature of the problem permits. And it "provides an adequate warning as to what conduct falls under its ban, and marks boundaries sufficiently distinct for judges * * * fairly to administer the law in accordance with the will of Congress." *United States v. Petrillo*, 332 U. S. 1, 7.

(e) The order does not invade any rights of appellants under Section 8 (c) of the Act

Appellants further contend (Br. 58-70) that the order of the court below, insofar as it restrains peaceful picketing, infringes appellants' rights under Section 8 (c) of the Act and hence is invalid. This contention, we submit, is likewise without merit.

Section 8 (c) of the Act provides that, "The expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute, or be evidence of, an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit." The language of Section 8 (b) (4) (A), in view of the phrase

“under any provisions of this Act” contained in Section 8 (c) must, we think, be read in conjunction with the latter provision. But this does not mean that picketing, such as conducted here, is withdrawn from the proscription of Section 8 (b) (4) (A).

Realistically viewed, it cannot be doubted that picketing, whatever its speech aspect may be, is more than speech. It is, as the Supreme Court has pointed out, an “industrial weapon.” *Ritter* case, *supra*, at p. 725. It is, as the court below noted (R. 111), a “forcible technique” which cannot be regarded solely as an appeal to the reason of workers or merely as a method for the dissemination of the facts of a labor dispute. It is more than that. It possesses elements of compulsion. For, as Mr. Justice Douglas pointed out in his concurring opinion in the *Wohl* case, “the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated” (315 U. S., at p. 776).¹⁸ Because of this aspect, picketing, we

¹⁸ Cf. Gregory, Charles O., *Labor and the Law* (1946), pp. 346-348:

“* * * It seems plain enough to many disinterested people that picketing, even peaceful picketing, is not at all just speech or the dissemination of information but is, rather, a type of coercion and is intended as such by its users. * * * How does the loyal employee, who wants to stay at work during a strike, react to picketing, and why? If he finally decides to stay at home during the strike, rather than cross the picket line, does that mean he has been convinced of the merits behind the union’s cause? And how about an applicant for employment during a strike, who decides not to cross a picket line, although he may need the work? * * * Are they inclined to this decision because they are convinced of the merits behind the union’s cause? And when the members of other unions unrelated by any common economic

submit, cannot be regarded as simply an expression of views, argument, or opinion within the meaning or protection of section 8 (c).

Other considerations also remove picketing from the protection of Section 8 (c) of the Act. Picketing constitutes an appeal to all working people to make common cause with the picketing group. Implicit in such an appeal is the promise that if the workers to whom the appeal is directed respond to the appeal the union or workers making the appeal will, in turn, if the occasion should arise, lend similar support to the workers whose assistance and cooperation is sought. Conversely, the appeal carries with it the threat that if it is ignored the union or workers making the appeal will, whenever the occasion arises, refuse to support those workers who fail to cooperate. As the Second Circuit Court of Appeals stated in *N. L.*

interest to the picketing union, refuse to enter picketed premises, are they reacting to personal intellectual conviction concerning the worth of the picketers' cause, or are they merely reacting to some tacitly understood signal that their sympathy is expected and must be given pursuant to established labor union policies?

"It is hard to believe that the reactions here recounted are all expressions of intellectual conviction as to the worth of the picketing unions' several causes. * * * Such a procedure is, indeed, a dubious venture into the world of ideas and opinions, and hardly seems to be the sort of thing contemplated by the constitutional guaranty of free speech. Rather, it suggests a sort of psychological embargo around the picketed premises, depending for its persuasiveness on the associations most people have in mind when they think about picketing. Hence it is likely that people hesitate to cross picket lines more because they wish to avoid trouble and to escape any possible scorn that might be directed toward them for being antiunion, than because they are persuaded intellectually by the worth of the picketing union's cause. * * *

R. B. v. Peter Cailler Kohler Swiss Chocolates Co., Inc., 130 F. 2d 503, in terms equally applicable here (at pp. 505-506):

When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a "concerted activity" for "mutual aid or protection" although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is "mutual aid" in the most literal sense, as nobody doubts. So too of those engaging in a "sympathetic strike," or secondary boycott; the immediate quarrel does not itself concern them, but by extending the number of those who will make the enemy of one the enemy of all, the power of each is vastly increased.

Viewed in this light, the picketing here under consideration carried with it an implicit promise of benefit, as well as a threat of reprisal, to those workers who heeded or ignored, as the case may be, the appeal for cooperation. Hence, the requirement of Section 8 (c) of the Act, that no expression of views, argument or opinion shall constitute or be evidence of an unfair labor practice within the meaning of the Act unless such expression contains a threat of reprisal or promise of benefit, is fully met.¹⁹

¹⁹ This is not to say that peaceful picketing of an employer involved in a labor dispute insofar as it seeks to induce any of his employees to join in a strike runs afoul of Section 8 (b) (1) (A)

The fact that the pickets did not make overt or explicit threats of reprisal or force or promises of benefit does not necessarily mean that the picketing is protected under Section 8 (c) of the Act. As shown by the legislative history of the Section, it is sufficient if the threat or promise is implicit in such conduct. The purpose of Section 8 (c) was to preclude the Board from taking into consideration in making findings of unfair labor practices, as Congress thought the Board had done in the past, unconnected or remote statements of attitude. Thus, as explained by the House Report on the original House version of Section 8 (c), "if an employer criticizes a union, and later a foreman discharges a union official for gross misconduct," the Board may not "'infer,' from what the employer said, perhaps long before, that the discharge was for union activity."²⁰ Similarly, the Senate Re-

of the Act, which makes it an unfair labor practice for a labor organization to restrain or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act, i. e., the right to engage in or to refrain from engaging in concerted activities for purposes of collective bargaining or other mutual aid or protection. Section 13 of the Act provides that nothing in the statute except as specifically provided therein shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right. The legislative history of the Act shows that Congress did not intend to illegalize strikes against a primary employer, as distinguished from a secondary employer, in support of demands for changes in terms and conditions of employment (93 Cong. Rec. 3950, 6603; H. Rept. No. 510, 80th Cong., 1st Sess., p. 43). Picketing of the primary employer in such circumstances is an incident of the right to strike. Just as the right to strike under such circumstances is protected, so too is the right to picket the primary employer.

²⁰ H. Rept. No. 245, 80th Cong., 1st Sess., p. 33.

port on the original Senate version of Section 8 (c) stated that the Board may not hold "speeches by employers to be coercive if the employer was found guilty of some other unfair labor practice, even though severable or unrelated."²¹ The House Conference Report on the bill which became the Act explained the purpose of Section 8 (c) as follows: "The necessity for this change in the law" was to prevent "using speeches and publications of employers concerning labor organizations and collective bargaining arrangements as evidence, no matter how irrelevant or immaterial, that some later act of the employer had an illegal purpose."²²

In the course of the debates on the bill which became the Act, Senator Ellender, a member of the Senate committee which considered the bill, stated that the purpose of Section 8 (c) was to preclude the use of "a casual speech" "no matter how remote or how separable" as "a part of the pattern of unfair labor practices."²³ Senator Taft, one of the sponsors of the bill, in answer to a question from Senator Pepper whether certain statements on the part of an employer which standing alone contained no threat or promise of benefit could be considered as evidentiary of unfair labor practices, replied:

All of these questions involve a consideration of the surrounding circumstances * * * There would have to be some other circumstances to tie in with the act of the employer.²⁴

²¹ S. Rept. No. 105, 80th Cong., 1st Sess., p. 23.

²² H. Report No. 510, 80th Cong., 1st Sess., p. 45.

²³ 93 Cong. Rec. 4261.

²⁴ 93 Cong. Rec., pp. 6604-6605.

It is apparent from these remarks that Congress by Section 8 (c) did not intend that the Board should never be free to take into consideration statements of attitude which did not in their context contain threats or promises of benefits. This conclusion is borne out by a significant change which was made in the House version of Section 8 (c) prior to its incorporation in the Act. Section 8 (d) (1) of the House bill (H. R. 3020) originally provided that the expressing of any views, arguments, or opinions shall not constitute or be evidence of an unfair labor practice "if it does not by *its own terms* threaten force or economic reprisal" [italics supplied]. The final version of Section 8 (c), as enacted, eliminated the phrase "by its own terms." This deletion persuasively suggests that Congress did not intend that the threats and promises of benefits which remove expressions of views and opinions from the protection of Section 8 (c) must necessarily appear in the context of such statements. And the deletion, coupled with the explanation of the sponsors of the Act, strongly indicates that Congress sought to do no more than to bar consideration of remote utterances having no rational connection with the particular conduct in question. Certainly, it was not the intention of Congress to preclude a consideration of threats or promises of benefit where, as here, they are implicitly and inextricably a part of the conduct in question.

(f) Section 10 (1) does not confer non-judicial functions on the district courts and is not invalid under Article III of the Constitution

Appellants also contend (Br. 82-85) that Section 10 (1) of the Act under which the jurisdiction of the

court below was invoked is invalid because Congress, under Article III of the Constitution, is without power to invest federal district courts with jurisdiction to grant interlocutory relief pending a determination of the unfair labor practice charges by the Board. This contention is clearly untenable.

Article III of the Constitution vests in Congress the power to define the jurisdiction of inferior federal courts. It provides as follows:

SECTION 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish * * *

SECTION 2. The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority; * * * to controversies to which the United States shall be a party.

Within the limitations of the "case" or "controversy" requirement the power of Congress to define the jurisdiction of the inferior federal courts is plenary. *Lockerty v. Phillips*, 319 U. S. 182; *Yakus v. United States*, 321 U. S. 414; *Bowles v. Willingham*, 321 U. S. 503, 511-512. The grant of jurisdiction to the federal district courts to award interlocutory relief during pendency of proceedings before the Board plainly falls within the scope of this grant of power to Congress.

A determination as to whether interlocutory relief should be granted or denied presents all of the prerequisite indicia of a "case" or "controversy" within

the meaning of Article III. Summarizing these indicia, the Supreme Court stated in *Aetna Life Insurance Co. v. Haworth*, 300 U. S. 227, at pp. 240-241:

A "controversy" in this sense must be one that is appropriate for judicial determination * * * A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot * * * The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests * * *. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

It has never been doubted that an application to a court of equity for interlocutory relief pending the court's final determination of a case presents a justiciable controversy in the constitutional sense as so defined. Nor does such an application present any the less a justiciable controversy within the meaning of the Constitution because the determination of the "merits" of a case, as under Section 10 (1) of the Act, is reserved to a tribunal other than the one to which application for interlocutory relief is made. *Evans v. International Typographical Union*, 76 F. Supp. 881 (S. D. Ind.); *Madden v. International Union, United Mine Workers of America*, 22 L. R. R. M. 2164 (D. C. Dist. Col.); *Looney v. Eastern Texas R. R. Co.*, 247 U. S. 214; *Erhardt v. Boaro*, 113 U. S. 537; *Eastern Texas Ry. Co. v. Railroad Commission*

of *Texas*, 242 Fed. 300 (D. C. W. D. Texas); *Northern Pacific Ry. Co. v. Soderberg*, 86 Fed. 49 (C. C. Wash).

That the grant of interlocutory relief upon a *prima facie* showing of facts is not, under Section 10 (1) of the Act, *res adjudicata* upon the "merits" of the case upon a final hearing before the Board, does not deprive the adjudication of its character as an adjudication in a justiciable controversy in the constitutional sense. The opposite conclusion would mean that no federal court in granting a temporary injunction is exercising a jurisdiction within the constitutional power of Congress to grant. The court's decision is, of course, *res adjudicata* as to the issue whether a temporary injunction should be granted upon the record presented.

The jurisdiction conferred on the district courts by Section 10 (1) of the Act entails no exercise of "non-judicial duties of an administrative or legislative character." *Pope v. United States*, 323 U. S. 1, 13. Whether the functions conferred upon a court are judicial, as distinguished from legislative or administrative, does not depend on whether they are designed to aid a legislative or administrative inquiry, but upon whether their exercise comports with the accepted standards of judicial operation. The "question depends" "upon the character of the proceedings." *Prentis v. Atlantic Coast Line*, 211 U. S. 210, 226. The proceeding here "is none the less the judgment of a judicial tribunal dealing with questions judicial in their nature, and presented in the customary forms of judicial proceedings, because its effect may be to aid an administrative or executive body in

the performance of duties legally imposed upon it by Congress in execution of a power granted by the Constitution.” *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 489. The grant of interlocutory relief during the pendency of Board proceedings is no less an exercise of judicial power than is the judicial enforcement of an administrative subpoena (*Brimson case, supra*), or the judicial enforcement of a final administrative order. (*Federal Radio Commission v. Nelson Bros.*, 289 U. S. 266, 274–278). In all three instances the scope of judicial inquiry is shaped to fit the needs of the statutory scheme Congress is empowered to create. As with an administrative subpoena, the judicial enforcement of which is required so long as the data demanded is not “plainly incompetent or irrelevant to any lawful purpose” of the agency (*Endicott Johnson Corp. v. Perkins*, 317 U. S. 501, 509), and as with the judicial enforcement of a final agency order which becomes incontestable if the legal tests of constitutional power, statutory authority and the basic prerequisites of proof are met (*Rochester Tel. Corp. v. United States*, 307 U. S. 125, 140), so here, the judicial function is neither abused nor debased by limiting judicial inquiry to ascertaining whether upon presentation of a *prima facie* case the grant of interlocutory relief is “just and proper.” *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186, 216. See, *Pope v. U. S.* 323 U. S. 1, 10–12; *Evans v. International Typographical Union, supra*.

Appellants argue, however (Br. 82, 86), that the court below abdicated its judicial function of ascertaining whether a *prima facie* case had been estab-

lished warranting the grant of interlocutory relief and accepted the contention that "a Board agent has an absolute right to injunctive relief in proceedings such as the instant case conditioned only upon a determination that 'reasonable cause' exists for his stated belief that an unfair labor practice has been committed" and that the court below was "not entitled to require *prima facie* evidence forming the basis for the Board's agent's belief in making that determination." No such argument was presented to the court below on behalf of appellee and the decision of the court below is in no way predicated upon any such hypothesis. On the contrary, the court below was specifically informed that in a proceeding under Section 10 (1) of the Act, where the facts are in dispute, there is a duty upon the Board's agent to establish by proof to the satisfaction of the district court that upon the facts adduced there is a reasonable probability that unfair labor practices are being committed, as charged, and that injunctive relief is just and proper (R. 201-202, 203). In the instant case, the pleadings, together with the affidavit of appellant Turner attached to the motion to dismiss the petition, disclosed that there was no genuine issue as to any material fact; hence, there was no necessity for adducing any additional evidence. In that state of the record, the court below could, as it did (R. 106), properly determine upon the basis of the pleadings alone that a *prima facie* case had been established warranting interlocutory relief. Cf. Rule 56 (c) of the Federal Rules of Civil Procedure.

Nor is it correct to say, as appellants do (R. 83), that the court below, in disregard of the principles laid down in *Hecht Co. v. Bowles*, 321 U. S. 321, issued the injunction without considering whether such relief was just and proper. The Act itself, of course, does not impose an absolute duty upon a district court to grant injunctive relief pursuant to Section 10 (1) merely upon a showing that there is reasonable cause to believe that unfair labor practices as charged are being committed. The Act expressly provides that a district court shall grant such relief as it may deem just and proper. The court below, mindful of the *Hecht* case, as is evident from its opinion, correctly granted the relief sought in the light of "the necessities of the public interest which Congress has sought to protect." *Hecht* case, *supra*, p. 330.

CONCLUSION

It is respectfully submitted that the order of the court below is proper and valid in all respects and that it should be affirmed.

ROBERT N. DENHAM,
General Counsel,

DAVID P. FINDLING,
Associate General Counsel,

WINTHROP A. JOHNS,
DOMINICK L. MANOLI,
ALBERT DREYER,

Attorneys,
National Labor Relations Board.

AUGUST 1948.

No. 11,894

IN THE

United States Court of Appeals

For the Ninth Circuit

PRINTING SPECIALTIES AND PAPER CON-
VERTERS UNION, LOCAL 388, A.F.L.,
and WALTER J. TURNER,

Appellants,

vs.

HOWARD F. LEBARON, Regional Direc-
tor of the 21st Region of the Na-
tional Labor Relations Board, on
behalf of the National Labor Rela-
tions Board,

Appellee.

FILED

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PAUL P. O'BRIEN,

CLERK

Upon Appeal from the District Court of the United States for the
Southern District of California, Central Division.

REPLY BRIEF OF APPELLANTS.

ROBERT W. GILBERT,

117 West Ninth Street, Los Angeles 15, California,

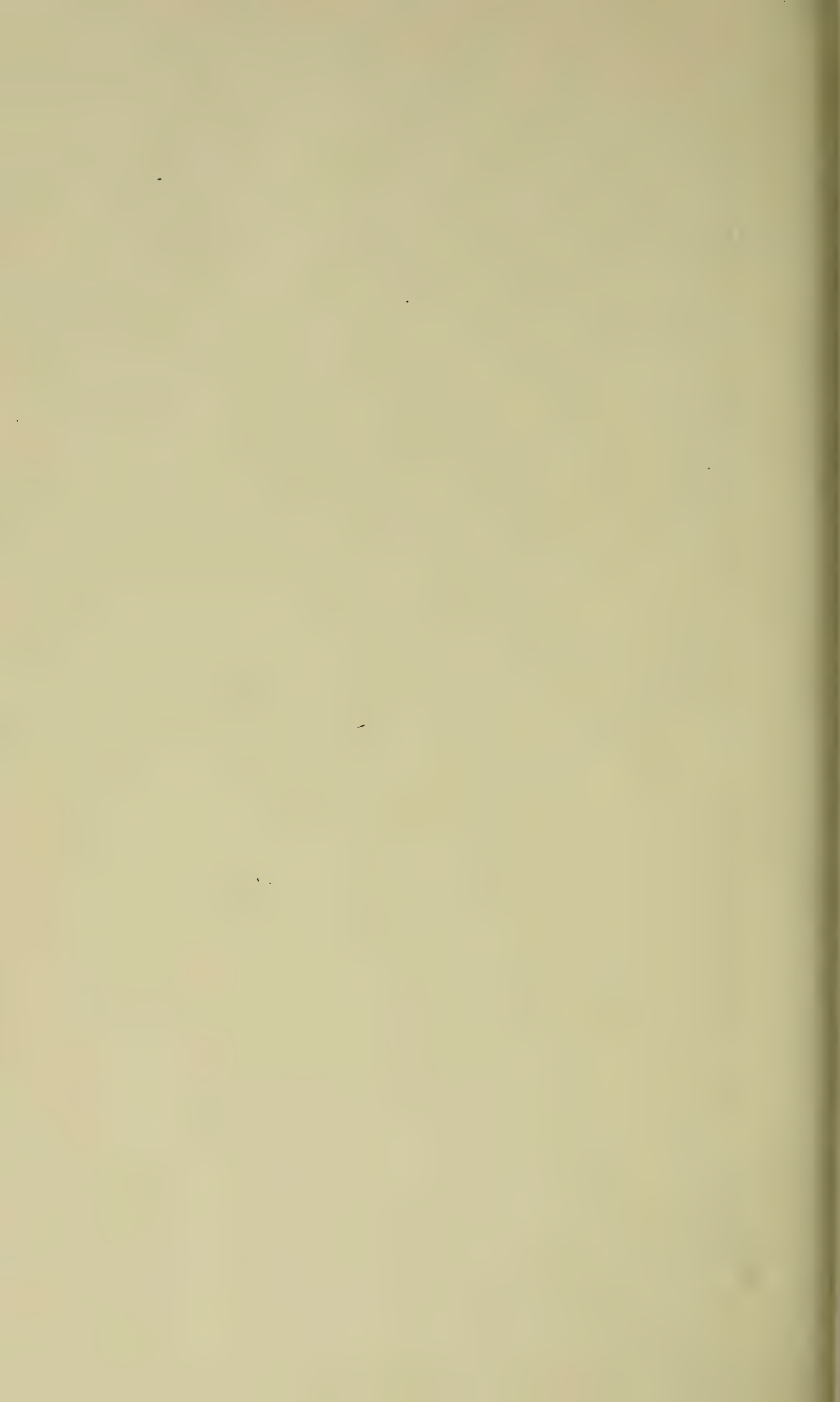
CLARENCE E. TODD,

625 Market Street, San Francisco 5, California,

ALLAN L. SAPIRO,

117 West Ninth Street, Los Angeles 15, California,

Attorneys for Appellants.



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Appellee.

Upon Appeal from the District Court of the United States for the
Southern District of California, Central Division.

REPLY BRIEF OF APPELLANTS.

**THE GRAVAMEN OF THE UNFAIR LABOR PRACTICE
CHARGES.**

As the General Counsel concedes, the facts in the instant case are "substantially undisputed," (Br. p. 35). The only direct evidence relating to the factual situation involved herein in the entire record is an affidavit of Appellant Turner (R. 20-26).

The General Counsel admits that "*the pickets did not make overt or explicit threats of reprisal or force or promises of benefits.*" (Br. 39). He had already stated on the record that the picketing involved herein "can be termed peaceful picketing." (R. 204). The General Counsel likewise does not take issue with the assertions by Appellants based upon the record that "the charge originally filed before the Board (R. 27-30) contains no reference to threats of reprisal or force or promise of benefit" (Op. Br. 66) and that "*the picketing in question did not materially affect or interfere with the normal business being conducted at those concerns* [the trucking concern and terminals company] and there was no intention on the part of the strikers to physically or otherwise obstruct the operations at those locations, or to picket any merchandise other than Sealright products." (Op. Br. 65).

While the General Counsel seeks to argue that the instant case is not "one where because of peculiar circumstances, such as were found to exist in the *Wohl* case, . . . it is impossible for appellants to publicize their legitimate grievances except by picketing the premises of employers who are not immediately concerned in the labor dispute" (Br. 27), he does not quarrel with appellants' adoption of the language from the Supreme Court opinion in *Bakery Wagon Drivers Local v. Wohl*, 315 U. S. at p. 775 to describe the factual situation now confronting this Court (Op. Br. 86), namely that:

“The record in this case does not contain the slightest suggestion of embarrassment in the task of governance; there are no findings and no circumstances from which we can draw the inference that the publication was attended or likely to be attended by violence, force or coercion, or conduct otherwise unlawful or oppressive; and it is not indicated that there was an actual or threatened abuse of the right to free speech through the use of excessive picketing.”

It might also be said here, as in the *Wohl* case, without disagreement arising that “. . . *the means here employed and contemplated . . . are such as to have slight, if any, repercussions upon the interests of strangers to the issue. . . .*” (315 U. S. at p. 776). The General Counsel contends however that “Whether employees of the neutral employer engage in a total strike or in a ‘product boycott,’ the effect upon the free flow of commerce is the same, differing only in degree.” (Br. 34).

The gravamen of the charge of unfair labor practices being prosecuted by the General Counsel against the appellants, then, consists of peaceful picketing in the course of which striking members of the labor organization advised employees of non-struck concerns that Sealright products were manufactured under strike conditions and for substandard wages, and requested them not to handle Sealright goods.

THE ESSENCE OF APPELLEE'S LEGAL POSITION.

The issues have been considerably narrowed due to the position taken by the General Counsel in his brief for the Appellee Regional Director.

In our Opening Brief, we cited and discussed numerous authorities of the Supreme Court of the United States upholding peaceful picketing pursuant to a legitimate labor dispute directed at the premises of the employer or at the products of the employer as the exercise of constitutional rights under the First Amendment. We then argued to this Honorable Court of Appeals for the Ninth Circuit that:

“Section 8(b)(4)(A) must, under these same Supreme Court decisions, be declared invalid on its face, unless peaceful picketing under the circumstances herein is deemed excluded from its terms by the immunizing language of Section 8(c). The District Court in the instant case failed to give Section 8(c) any effect whatsoever or to rule as to its applicability to Section 8(b)(4)(A) . . .” (Op. Br. 61).

Responding to this argument, the General Counsel states:

“The language of Section 8(b)(4)(A), in view of the phrase ‘under any provisions of this Act’ contained in Section 8(c) must, we think, be read in conjunction with the latter provision. But this does not mean that picketing, such as conducted here, is withdrawn from the proscription of Section 8(b)(4)(A).” (Br. 35-36).

Again with reference to our reliance upon the Fifth Amendment's guaranty of due process, he answers:

"Section 8(b)(4)(A) must be read in conjunction with Section 8(c) of the statute. So read, Section 8(b)(4)(A) provides that it shall be an unfair labor practice for a labor organization to engage in a strike or to induce or encourage *by threats of reprisal or force or promise of benefit*, the employees of any employer to engage in a strike or concerted refusal, *et cetera*.

"Assuming for the sake of argument that Section 8(b)(4)(A) standing alone might be invalid because of vagueness, the addition of the italicized qualification plainly leaves no room for doubt as to its meaning. . . ." (Br. 34-35).

Having conceded that the expression of views, argument, or opinion which contain no threat of reprisal or force or promise of benefit (such as statements of the Sealright strikers concerning the facts of the labor dispute with their employer) cannot constitute or serve as evidence as a violation of Section 8(b)(4)(A), the General Counsel argues that peaceful picketing in connection therewith is not immunized because it is a "coercive technique" (Br. 7), or in the language of the District Court a "forcible technique" (Br. 36).

Moreover, according to the General Counsel "Picketing constitutes an appeal to all working people to make common cause with the picketing group. Implicit in such an appeal is the promise that if the workers to whom the appeal is directed respond to

the appeal the union or workers making the appeal will, in turn, if the occasion should arise, lend similar support to the workers whose assistance and cooperation is sought. Conversely, the appeal carries with it the threat that if it is ignored the union or workers making the appeal will, whenever the occasion arises, refuse to support those workers who fail to cooperate." (R. 37).

Contrary to the leading decisions of the Supreme Court of the United States, *the General Counsel contends in essence that peaceful picketing is not an exercise of Free Speech, unless confined to the immediate vicinity of the premises of "the employer or company whose employees are directly involved in a labor dispute."* (Br. 17).

I.

WHILE PICKETING ACTIVITIES ARE NOT IMMUNE FROM ALL REGULATION, APPELLEE HAS FAILED TO BRING SECTION 8(b)(4)(A) WITHIN THE ALLOWABLE AREA OF GOVERNMENTAL CONTROL.

In our Opening Brief, it was expressly pointed out that the District Court herein had relied on a partial quotation from Mr. Justice Douglas in the *Wohl* case, *supra*, to the effect that the non-speech aspects of picketing "make it the subject of restrictive regulation" without giving any weight to the qualifying language immediately following in the quoted opinion, that ". . . since 'dissemination of information concerning the facts of a labor dispute' is constitution-

ally protected, a State is not free to define 'labor dispute' so narrowly as to accomplish indirectly what it may not accomplish directly." (Op. Br. 67-68, referring to 315 U. S. at p. 776).

We also referred to a similar partial quotation from the *Thornhill* case where the Court recognized "the power of the State to set the limits of permissible contest open to industrial combatants." The Court quickly added in its opinion that "It does not follow that the state in dealing with the evils arising from industrial disputes may impair the effective exercise of the right to discuss freely industrial relations which are matters of public concern." (Op. Br. 68, quoting 310 U. S. at p. 103).

Nevertheless, *the Brief for Appellee indulges in these same elliptical quotations*, of the type employed by the District Court herein, and used by various anti-picketing opinions and briefs to distort the authority of the *Wohl* and *Thornhill* cases identifying peaceful picketing with free speech (Br. 22, 24 and 26).

The fallacy of applying this ellipsis is borne out by Professor Armstrong in her article entitled "*Where Are We Going with Picketing?*," published in the March, 1948, issue of the California Law Review. The article quotes the *caveat* from the *Thornhill* opinion and comes to the conclusion that "the rights of employers and employees to conduct their economic affairs" which the Supreme Court says are "subject to modification or qualification" as "an instance of the power of the State to set the limits of permis-

sible contest open to industrial combatants" concern "activities other than speech activities," or in other words, "the nonspeech aspects of picketing," where there is danger of physical destruction of property or injury to person through violent conduct (36 Calif. L. Rev. 1, at pp. 12, 13). Professor Armstrong brands the use of this first paragraph standing alone as "a clear *misuse* of the quotation from the *Thornhill* case" since the quotation "was followed by a paragraph that made its boundaries clear." (36 Calif. L. Rev. at p. 24).

In the same fashion, the General Counsel cites a dictum from the *Ritter's Cafe* case out of context as authority for the proposition that the injunction against picketing in the present case is valid because "Appellants are left free to use the 'traditional modes of communication' other than picketing the business places of neutral employers, such as L. A., Seattle and West Coast, for the purpose of publicizing their grievances with their real adversary, namely Sealright." (Br. 26-27).

Actually, the nature of Sealright products—milk bottle caps and paper food containers—causes them to lose their identity as to place of manufacture before reaching the ultimate consumer on milk bottles or as food packages bearing the trade names of various dairy companies or food products corporations. The District Court injunction forbidding appellants from following the subject matter of the dispute, set apart a particular enterprise—Sealright—and freed it from

all effective picketing in the same fashion as the New York injunction in the *Wohl* case, of which Mr. Justice Douglas said:

“If the principles of the *Thornhill* case are to survive, I do not see how New York can be allowed to draw that line.”

Moreover, the General Counsel ignores the pronouncement of the High Court in *Schneider v. New Jersey*, 308 U. S. 147, 163, 60 S. Ct. 315, 89 L. Ed. 430 that——

“... the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.”

(See the very recent case of *Saia v. New York*, 334 U. S. 558, 68 S. Ct. 1148, 92 L. Ed. 1087.)

He also ignores the specific reference in the *Thornhill* case to this same doctrine, found at 310 U. S., p. 106.

In contending that Congress can proscribe picketing “for an unlawful purpose”, (Br. 27-34 the General Counsel chooses to ignore the detailed argument of our Opening Brief citing cases in support of the proposition that picketing for a purpose reasonably related to employment conditions and the objects of collective bargaining is picketing for a *lawful purpose* protected by the Constitution (Op. Br. 48-52). His effort to uphold a statute forbidding picketing on the

ground that the same statute embodies a declaration that the purpose of such picketing is illegal amounts to nothing more than begging the question. Or, as the Supreme Court of California put it in the *Blaney* case (discussed at length in our Opening Brief and again *infra*), "the question still remains as to what purposes or means may be declared unlawful by the Legislature or the courts without violating the provisions of the Constitution."

This entire phase of the case may be summarized by briefly quoting from the *Carlson* case, 310 U. S. at 113:

"The power and duty of the State to take adequate steps to preserve the peace and protect the privacy, the lives, and the property of its residents cannot be doubted. But the ordinance in question here abridges liberty of discussion under circumstances presenting no clear and present danger of substantive evils within *the allowable area of State control*."

II.

THE ARGUMENT CLEARLY SET OUT IN OUR OPENING BRIEF, SUPPORTED BY ALL THE CONTROLLING AUTHORITIES, TO THE EFFECT THAT THE PICKETING IN THE CASE AT BAR IS THE EXERCISE OF A CONSTITUTIONAL RIGHT IS NOT REFUTED OR EVEN ANSWERED IN THE BRIEF OF APPELLEE.

At page 43 of our Opening Brief we quoted the language used by the attorney for Appellee at the oral argument in which he stated that the *Ritter's*

Cafe case holds that peaceful picketing and peaceful boycott should be limited to a dispute between an employer and his own employees.

We pointed out in our Opening Brief, at page 46, that *Bakery Wagon Drivers Local v. Wohl*, 315 U. S. 769, 62 S. Ct. 816, 86 L. Ed. 1178, holds that picketing of a struck employer is within the constitutional guarantee of free speech.

On the same page we quote the language of the learned trial court (R. 111), resting his decision in support of the injunction on the *Ritter's Cafe* case, 315 U. S. 722, 62 S. Ct. 807, 86 L. Ed. 1143, which he stated prohibited picketing of the character found in the case at bar as a "forcible technique."

Counsel for appellee makes the bald statement (Br. 27) that this is not a case similar to *Cafeteria Employees Union v. Angelos*, 320 U. S. 293, 64 S. Ct. 126, 88 L. Ed. 58, or *A.F. of L. v. Swing*, 312 U. S. 321, 61 S. Ct. 568, 85 L. Ed. 855.

The five-to-four decision in the *Ritter's Cafe* case, if Shepard's Citator is correct—and it generally is—has *never once* been cited by the Supreme Court of the United States. The unanimous decision in the *Wohl* case, which upholds as a constitutional right the picketing of the product of a struck employer—the exact type of picketing involved in the case at bar—has, on the other hand, been repeatedly cited. And the most significant citation of the *Wohl* case is the one found in the *Ritter's Cafe* case itself where the majority of the court, in limiting the right of

picketing, made it clear (315 U. S. at p. 727) that they were not in any way limiting or abridging the rule in the *Wohl* case, which upholds the right of the union "in following the subject matter of their dispute." It is very significant that when the *Ritter's Cafe* case is cited in an argument against the constitutional right of peaceful picketing, page 727 is *always omitted*.

To boil the argument down: We have the clear, manly and frank statement of Counsel for the Appellee that the intent of the Taft-Hartley Act is to limit peaceful, economic action by a union to a dispute between an employer and his own employees, and in order to prevail on this appeal that argument must be pressed to its limit. On the other hand, we have the language of *A. F. of L. v. Swing, supra*, decided *before* the *Ritter's Cafe* case and the same language repeated in *Cafeteria Employees Union v. Angelos* decided *after* the *Ritter's Cafe* case holding that the constitutional right of boycott and picketing cannot be abridged "by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him." It is clear, therefore, that we have here a conflict between the General Counsel of the National Labor Relations Board and the Supreme Court of the United States. Counsel for the Appellee say (Br. 17) that peaceful picketing may be limited to a dispute between an employer and his own employees. The Supreme Court of the United States in two leading cases (the *Swing* and *Wohl* cases) holds

specifically and in language so plain that it cannot possibly be misunderstood that this is precisely what courts or legislatures *cannot do*. The duty of this Court, therefore, is clear, namely, to follow the unequivocal ruling of the Supreme Court of the United States and hold that the right of primary boycott and of picketing pursuant thereto includes the right to follow the product of the struck employer.

There has been a great deal of nonsense uttered and urged with regard to the type of picketing involved in the case at bar. In this portion of the argument we shall follow the method of the Restatement of Torts and avoid the use of the word "boycott." Instead, we will use the language of the Supreme Court of the United States and call this activity the following by the union of the subject matter of the dispute. We have strong authority in decisions of the Supreme Court of California in support of this right by a union. In the *Fortenbury* case, 16 Cal. (2d) 405, 106 P. (2d) 411, cited in our Opening Brief, the Supreme Court of California held that one who handles the product of a struck employer becomes an ally,—*not a neutral, but an ally*. And the Supreme Court of the United States, in *Milk Wagon Drivers v. Meadowmoor Dairies*, 312 U. S. 287, 61 S. Ct. 552, 85 L. Ed. 836, 132 A.L.R. 1200, first describes the acts prohibited as involving interference "with the sale of plaintiff's products by picketing stores where its products were sold," all of this having been accompanied by extreme violence over a considerable period of time. The decision of the Supreme Court in that case upheld the

injunction against picketing solely on the ground of violence, and the Court pointed out (at page 298) that the injunction should continue only during the continuance of the violence or the immediate threat of violence.

When we look at the issue before us objectively and with an unprejudiced eye, we see that what the General Counsel seeks to prohibit under the language of the Taft-Hartley Act is the following by a striking union of the subject matter of the dispute. We see that precisely this form of activity was upheld by the Supreme Court of the United States in the *Meadow-moor* case so long as only peaceful picketing is employed. That this activity is upheld by the Supreme Court of the United States in the *Wohl* case in a unanimous decision where picketing was peaceful, and lest there should be any doubt in anybody's mind, the court again, in the *Ritter's Cafe* case, decided on the same day, repeated and upheld the rule in the *Wohl* case.

These are rulings of the Supreme Court on the identical objective state of facts which we find in the case at bar.

Now if we join issue with the broader contention of the Appellee here as stated by counsel and cited above that the intent of the Taft-Hartley Act and of the Appellee in this case is to strike down the right of peaceful picketing, except in a dispute between an employer and his own employees, we find this theory categorically denied and disapproved by the Supreme Court in the *Swing* and *Angelos* cases, cited *supra*.

III.

APPELLEE HAS FAILED TO RECOGNIZE THAT THE ANTI-BOYCOTT RESTRICTIONS HELD UNCONSTITUTIONAL IN THE *BLANEY* CASE BY THE SUPREME COURT OF CALIFORNIA FOLLOWING THE CONTROLLING DECISIONS OF THE SUPREME COURT OF THE UNITED STATES ARE THE SAME AS THOSE OF SECTION 8(b)(4)(A).

Appellee has completely disregarded the sound reasoning of the California Supreme Court in the *Blaney* case, 30 Cal. (2d) 643, 184 P. (2d) 893, cited repeatedly in our Opening Brief. The significance of this recent holding as applied to the constitutional issues raised by Section 8(b)(4)(A) has been clearly noted by legal scholars.

In the January, 1948, issue of the Michigan Law Review at pages 435-436, the writer comments in the following fashion:

“Perhaps the most interesting feature of this case is that the reasoning of the court seems to apply equally as well to the language of Section 8(b)(4)(A) of the Labor Management Relations Act of 1947 (the Taft-Hartley Act). This section of the new federal labor statute brands as an unfair labor practice and makes enjoinable inducement or encouragement of a strike or refusal to handle certain goods where an object thereof is to force or require an employer to cease doing business with any other person. Both ‘hot goods’ and ‘secondary’ boycotts are covered by the language of the section and the prohibitions upon inducement or encouragement of such action seems to cover picketing or other publication of the facts of a labor dispute which seeks to bring about such a boycott. The California court in the instant

case, in declaring such inducement or encouragement by picketing to be within the area of free speech, is strictly in line with the Supreme Court picketing cases since 1940, and the conclusion seems inescapable that, barring a repudiation of its previous decisions or a drastic 'reading down' of the terms of the Taft-Hartley Act, the Supreme Court will declare invalid section 8(b)(4) (A) when it is called upon to adjudicate the constitutionality of that section."

See also 21 So. Cal. Law Review, pp. 76-92, December 1947.

Following the issuance of the Memorandum Opinion by the District Court in the instant case on February 3, 1948 (75 F. Supp. 678), the Supreme Court of California reaffirmed the principles of the *Blaney* decision in *Simons Brick Co. v. United Brick, Tile and Clay Workers*, 32 A.C. 176, handed down on June 29, 1948, without dissent.

IV.

WHILE THE GENERAL COUNSEL HAS RETREATED FROM HIS FORMER POSITION THAT AN INJUNCTION MUST ISSUE UNDER SECTION 10(1) UPON THE FILING OF A CREDIBLE PETITION BY THE REGIONAL DIRECTOR, THE DISTRICT COURT APPLIED THAT UNTENABLE RULE HEREIN.

At the argument below, the attorney for the General Counsel took the position that "... we do not have to show, as we see it, ... irreparable harm, as is usually the case ... in an equity proceeding. ... We would have to make a showing by testimony that

the Regional Director does have reasonable cause. . . . The court still does have the question of determining whether or not the Regional Director does have reasonable cause to believe that a violation has been committed." (R. 201-203, cited at Br. 46). This view was accepted by the District Court which held that ". . . the specific injunctive processes expressly conferred upon this court by Section 10(1) of the Act become operable upon the credible petition of the administrative agency as provided in the Act." (R. 106).

Now, the General Counsel would disavow the position which he successfully persuaded the District Court to adopt, stating, "The Act itself, of course, does not impose an absolute duty upon a district court to grant injunctive relief pursuant to Section 10(1) merely upon a showing that there is reasonable cause to believe that unfair labor practices as charged are being committed." (Br. 47).

The conflict of this ancillary function conferred upon the District Court by Section 10(1) with the "separation of powers" defined by Article III of the Constitution becomes apparent in this case. An injunction was issued by the District Court on February 16, 1948, following a holding that "the picketing activities, which prompted the representatives of the Board to petition the court for injunctive relief, can in truth hardly be said to have been motivated by 'dissemination of information concerning the facts of a labor dispute.' " (R. 111). As pointed out by the General Counsel himself in a speech quoted in our

Opening Brief, the Trial Examiner who shortly thereafter heard the charges upon which the injunction was based, came to a contrary conclusion as to the *law of the case* (Br. 17), holding that such peaceful picketing is protected by the First and Fourteenth Amendments, as well as embraced within the language of Section 8(c) of the amended Act, and recommended that the complaint be dismissed by the Board in its entirety.

No such situation could arise whereby the administrative agency might in effect reverse the conclusions of law of the District Court under those statutes permitting judicial enforcement of an administrative subpoena or judicial enforcement of a final administrative order, relied upon by Appellee as comparable to Section 10(1) (Br. 45).

Dated, September 15, 1948.

Respectfully submitted,

ROBERT W. GILBERT,

CLARENCE E. TODD,

ALLAN L. SAPIRO,

Attorneys for Appellants.

No. 11,894

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PRINTING SPECIALTIES AND PAPER CON-
VERTERS UNION, LOCAL 388, A.F.L.,
and WALTER J. TURNER,

Appellants,

vs.

HOWARD F. LEBARON, Regional Direc-
tor of the 21st Region of the National
Labor Relations Board, on Behalf of
the National Labor Relations Board,

Appellee.

APPELLANTS' PETITION FOR A REHEARING
and
BRIEF IN SUPPORT THEREOF.

CLARENCE E. TODD,

625 Market Street, San Francisco 5, California,

ROBERT W. GILBERT,

117 West Ninth Street, Los Angeles 15, California,

ALLAN L. SAPIRO,

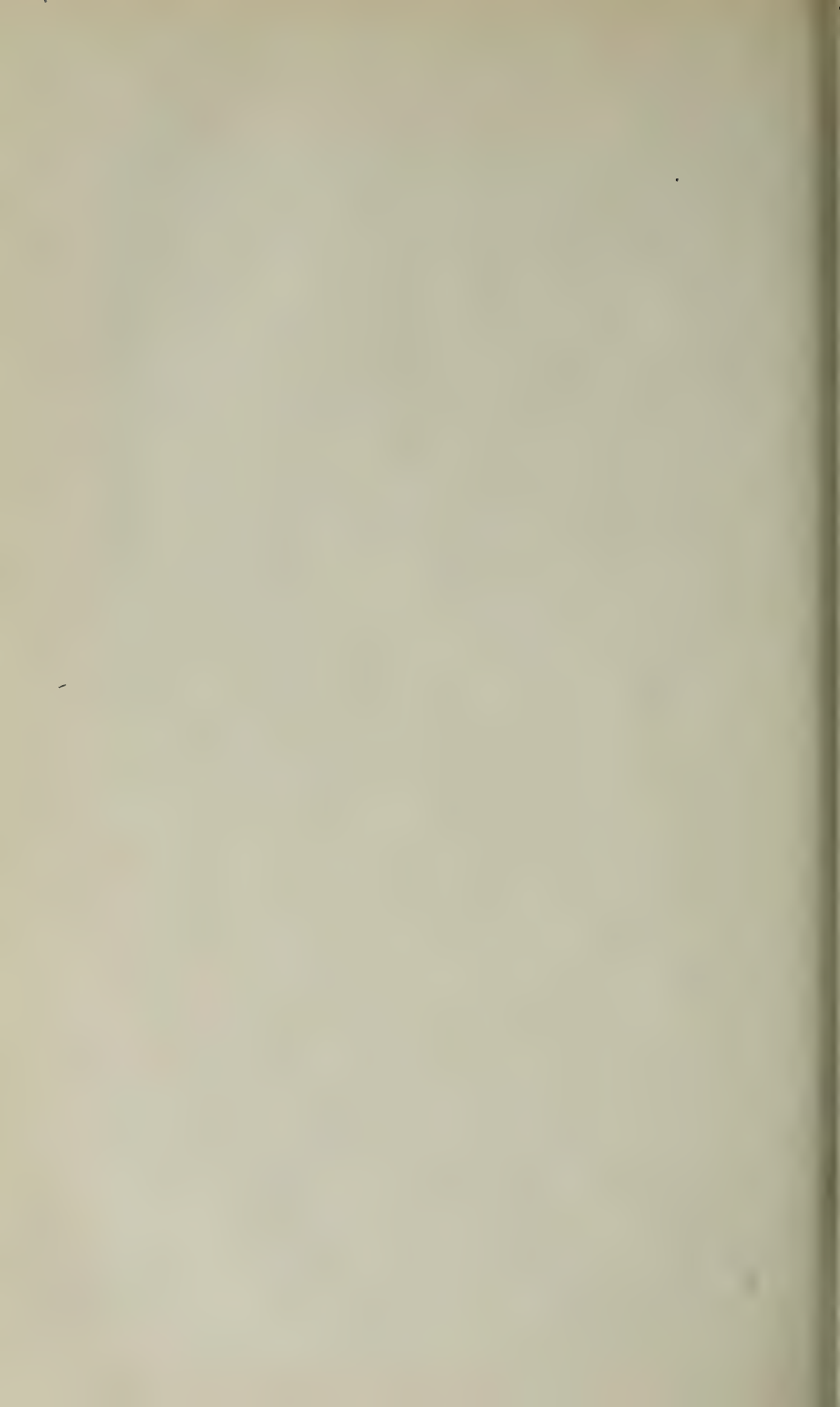
785 Market Street, San Francisco 3, California,

*Attorneys for Appellants
and Petitioners.*

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CLERK



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No. 11,894

IN THE

**United States Court of Appeals
For the Ninth Circuit**

PRINTING SPECIALTIES AND PAPER CON-
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Appellee.

APPELLANTS' PETITION FOR A REHEARING.

*To the Honorable William Denman, Presiding Judge,
and to the Honorable Associate Judges of the
United States Court of Appeals for the Ninth
Circuit:*

Come now appellants and within proper time file this, their petition for rehearing, pointing out the following errors of the Court appearing on the face of the opinion.

I.

The Court correctly understood the issue herein, to-wit, whether peaceful picketing can be restricted to a circle comprising only an employer and his own employees, but this Court inadvertently failed to note that the Supreme Court of the United States has repeatedly held that picketing cannot be so restricted.

II.

This Court inadvertently failed to note that the Supreme Court of the United States has recognized the right of peaceful picketing within the nexus of the dispute, within the area of economic interdependence, and that the Court has definitely held that peaceful picketing of the type found in the case at bar is protected by the Bill of Rights.

III.

This Court correctly stated that picketing is designed to be effective and frequently is effective in that workers generally will not pass a picket line, but this Court erred grievously in holding that effective picketing is not protected by the Bill of Rights.

IV.

This Court has misconstrued the status of Section 8(c) in the situation at bar.

V.

The Court has misconstrued the decisions which mention unlawful purpose and has inadvertently failed

to note that the right of peaceful picketing has been upheld by the Supreme Court of the United States even though carried on in violation of and in defiance of a statutory enactment.

VI.

This Court has inadvertently taken a completely unrealistic view of the situation before us and has ignored the situation with regard to the constitutional right of peaceful picketing which is a matter of common knowledge with the bench, the bar, and legal literature.

Appellants respectfully pray the Court to grant a rehearing herein.

Dated, San Francisco, California,
January 7, 1949.

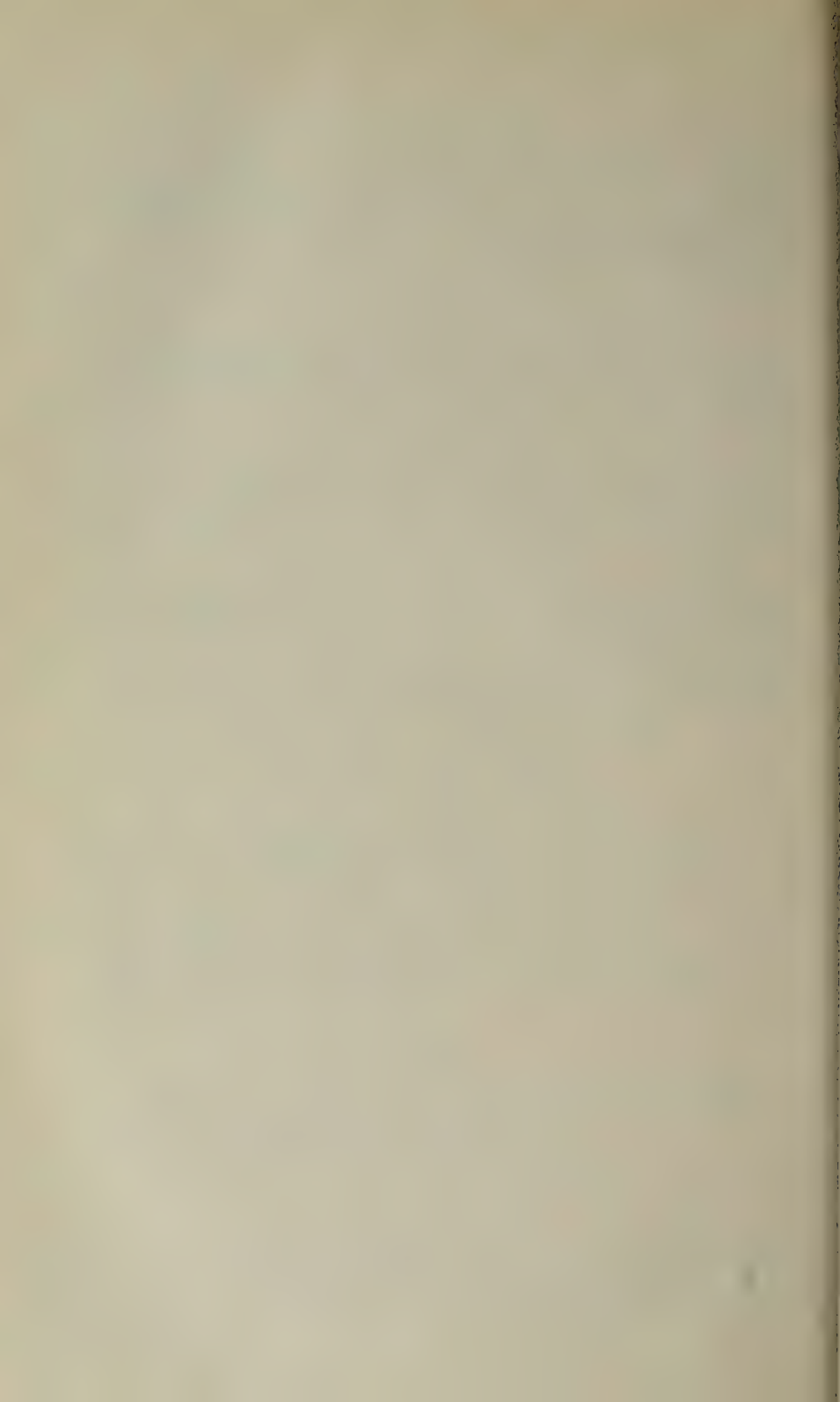
Respectfully submitted,

CLARENCE E. TODD,

ROBERT W. GILBERT,

ALLAN L. SAPIRO,

*Attorneys for Appellants
and Pctitioners.*



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BRIEF IN SUPPORT OF PETITION FOR A REHEARING.

Appellants most earnestly urge this Court to grant a rehearing of this case, and in that behalf we wish to lay the following considerations before the Court:

We accept the statement of the issue found in the last paragraph on page 3 of the opinion, and where the Court (on page 5) relies upon the *Ritter's Cafe* case as decisive of the constitutional right of peaceful picketing within the particular industry in this case, we will point out that that decision holds to the exact contrary.

We believe that the Court has completely misconstrued the scope and effect of Section 8(c), and in particular that the Court did not have in mind the manner in which 8(c) was dragged into the case.

Finally, we believe that this Court has completely misapprehended the very meaning of picketing as it is discussed and upheld in the controlling decisions of the Supreme Court of the United States. And now let us proceed as briefly and succinctly as we may to the points of the argument.

I.

THE ISSUE HERE AS POSED BY THE GENERAL COUNSEL AND AS ACCEPTED BY THIS COURT AS TO WHETHER PICKETING CAN BE RESTRICTED TO A CIRCLE COMPRISING AN EMPLOYER AND HIS OWN EMPLOYEES HAS BEEN REPEATEDLY DECIDED BY THE SUPREME COURT OF THE UNITED STATES IN FAVOR OF THE CONTENTION OF APPELLANTS HEREIN.

At page 3 of the opinion the issue is summarized in this way: "The debate here is whether peaceful picketing may constitutionally be confined to the area of an industrial dispute, or in plainer language, to the premises of the employer with whom the dispute is in progress." This is the position taken by the attorney for the Regional Director.

Now we respectfully submit that this very question has been before the Supreme Court of the United States not once but repeatedly and in every single instance the Supreme Court has held distinctly, and in several cases by the use of the same terms as quoted

above, that economic activity cannot be so confined. In the case of *A. F. of L. v. Swing* (312 U.S. 321, 61 S.Ct. 568 [85 L.Ed. 855]), cited repeatedly in our Opening Brief, the same contention was made with regard to the right to limit picketing to an area comprising only an employer and his own employees and the Supreme Court said (at page 326), "A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him."

We have in mind the distinction sought to be drawn by this Court in its opinion between picketing which is free speech and picketing which is conducted in support of a boycott; in other words, between ineffective and effective picketing. This we shall discuss fully a little later. But just now we are talking about the *area* of picketing, not its effectiveness or ineffectiveness, and it is clear that when this Court seeks to restrict the *area* to a circle comprising only an employer and his own employees the Court is attempting to overrule the decisions of the Supreme Court of the United States.

While considering this point, it may be well to recall that this same language was used by the Supreme Court in *Cafeteria Employees Union v. Angelos*, 320 U.S. 293, at 296. Although the *Angelos* case, decided a year and a half after the *Ritter's Cafe* case, was cited repeatedly to this Court by appellants (Op. Br. 33, 47, 51; Reply Br. 11, 12) the instant opinion *totally*

ignores this latest pronouncement by the Supreme Court on the constitutional aspects of peaceful picketing. In relying upon the *Ritter's Cafe* case for the proposition that “* * * the state has the right to determine whether the common interest is best served by imposing restrictions upon the use of weapons for inflicting economic injury in the struggle of conflicting industrial forces”, this Court has chosen to disregard the *unanimous decision* in the *Angelos* case which gave recognition through the opinion of Mr. Justice Frankfurter (who also wrote the *Ritter's Cafe* opinion) to “* * * the right of workers to state their case and to appeal to the public for support in an orderly and peaceful manner *regardless of the area of immunity as defined by State policy.*”

In addition we call the Court's attention to *Milk Wagon Drivers v. Meadowmoor Dairies*, 312 U.S. 287, where it appears in the statement of the case that the employers brought suit against the union “to enjoin defendants from interfering with the sale of plaintiff's products by picketing stores where its products were sold,” etc. And in that case it was held that such picketing was a constitutional right and could not be restrained where it was carried on peacefully. (See pages 298, 299.)

II.

THE SUPREME COURT IN THE RITTER'S CAFE CASE DID NOT RESTRICT THE AREA OF PICKETING TO AN EMPLOYER AND HIS OWN EMPLOYEES BUT RECOGNIZED THE RIGHT OF PICKETING ANYWHERE WITHIN THE INDUSTRY.

The *Ritter's Cafe* decision (315 U.S. 722) is cited in favor of various forms of restriction. The learned trial judge in the case at bar cited the *Ritter's Cafe* decision as prohibiting "coercive" picketing; and the opinion of this Court cites the same decision as upholding the limitation of picketing to the premises of the employer and to a circle comprising only an employer and his own employees.

The *Ritter's Cafe* case occupies an interesting position. It has never, so far as the Citator shows, been cited by the Supreme Court of the United States, not even in subsequent picketing decisions written by the same author. However, it was a majority decision, has never been reversed and is accepted here as laying down a certain limitation on picketing under certain circumstances then before the Court.

The facts are no doubt familiar to the Court. The carpenters and painters had a dispute with a building contractor who was employing non-union labor. They picketed the building project and the Supreme Court of the United States in this decision upheld their right to picket the building project and, impliedly, to picket the building contractor wherever he might be engaged (page 727). However, the courts of Texas held, and the Supreme Court of the United States affirmed the ruling, that the carpenters and painters might be pre-

vented by state law and by consequent injunction from picketing a fully unionized restaurant located a mile and a half from the building project and having, so far as the record shows, no connection with the building then being constructed, except that the restaurant belonged to the same man who had engaged the contractor to construct the building a mile and a half away.

The Supreme Court of the United States held that there was no "nexus" between the construction of the building for some unidentified purpose and the fully unionized cafe, and the Court spoke in that regard of the conscription of neutrals. In order to make perfectly clear what they meant, or rather what they did not mean, by "neutrals" or "conscription" the Court went out of its way (at page 727) of the *Ritter's Cafe* decision to reaffirm the decision handed down the same day in *Bakery and Pastry Drivers v. Wohl*, 315 U.S. 769, where they upheld the right of striking bakery drivers to picket the customers of their employer.

Thus we find that a careful examination of the *Ritter's Cafe* case shows that in the first place it says nothing about "coercive" picketing as distinguished from any other kind of picketing. In other words, it does not discuss the nature of picketing at all, though it takes for granted that lawful picketing will probably cause damage to the person picketed. Far from limiting the area of picketing to a circle comprising an employer and his own employees, the Court, by its reference to the *Wohl* case indicates that the decision is not intended to have that effect at all. What the

decision does uphold is the right of picketing anywhere in the industry, thus approving without specifically mentioning the language of Chief Justice Taft in the old *Tri-City* case (*American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, at 213, 214) where it was held that the members of a labor union, and the union itself, are interested in labor conditions throughout the industry. (See also to the same effect page 209.)

In the case at bar, we have peaceful picketing by employees of a struck employer of the products of the employer located on trucks and ready for shipment. This is completely analogous to the picketing by the milk wagon drivers of the product of their employer—milk—in the *Meadowmoor* case, *supra*, or by the bakery drivers of the products of their employer, to wit, bread, in the *Wohl* case. In fact, in the latter two cases the language of the Court refers to the picketing of the customers themselves rather than of the product, and while this might seem to indicate a distinction between “secondary boycott” and a “product boycott” it would not seem necessary to go further into this distinction at this time.

The *Ritter's Cafe* case does not in any way support the opinion of this Court, and we ask for a rehearing for that, among other reasons.

III.

THIS COURT HAS INTERPRETED THE RESTRICTIONS OF SECTION 8(b)(4)(A) IN A MANNER WHICH DOES VIOLENCE TO ITS LEGISLATIVE HISTORY.

While this Court is quite correct in stating that the Taft-Hartley Act does not use the terms “hot cargo,” “picketing the product,” or “secondary boycott,” (Opinion, p. 4), neither does Section 8(b)(4)(A) refer to any form of picketing in express terms. On its face, the statute forbids unions or their agents to “induce or encourage” certain prohibited activity, without reference to means. This admittedly broad and sweeping restriction must be interpreted with reference to the legislative history. (The Court will recall that the General Counsel’s attorney agreed at the oral argument of this case that he would furnish the Honorable Judges with a copy of the 2-volume compilation of the legislative history of the Labor Management Relations Act, 1947, prepared by the National Labor Relations Board and published by the Government Printing Office, for use in administering the statute.)

In refusing to make the distinction between the type of picketing involved in this case, and other concerted activities aimed at bringing full-scale economic sanctions against a non-disputing employer, this Court has overlooked or failed to give weight to the debate between Senator Robert A. Taft of Ohio and Senator Claude Pepper of Florida, cited at page 55 of appellants’ Opening Brief. There Senator Pepper contended that under Section 8(b)(4)(A) “the language

would forbid one man or one agent of a labor union going to the employees of another employer working on a product put out by a manufacturer who would be unfair to them in their opinion and attempting to *persuade or induce those workers not to handle the output* of the factory in which there was a disagreement with the workers," and Senator Taft immediately rejected the notion by stating, "I do not quite understand the case which the Senator has put. This provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees." (93 Daily Cong. Rec. 4322-4323, 4/20/47.)

IV.

THIS COURT HAS MISCONSTRUED THE STATUS OF SECTION 8(c) IN THIS LEGAL SITUATION.

This Court, in the second paragraph on page 4, seems to indicate that defendants were the first to cite Section 8(c) for their own protection. This is erroneous. Section 8(c) was brought into the case by the Regional Director by inserting in the findings a recital that the picketing, which this Court concedes was peaceful (page 3 end of first paragraph), contained a threat of reprisal or force and promise of benefit.

There was no such statement in the charge and we object most strenuously to the insertion of that language in the finding without there being the slightest

evidence to support it. And now let us take up the language of this Court in attempting to uphold this finding. In the last paragraph on page 4 this Court discusses the ordinary effect of a picket line, and in particular the feeling and the conduct of union workers in the presence of a picket line. This Court recognizes that union members usually respect a legitimate picket line, and the Court states that it is naive to assume that a picket line which is thus respected is merely a means of disseminating information.

What is naive about that statement is that picketing is unlawful the moment it becomes effective! The nationwide citation in anti-labor briefs to the language of Justice Douglas in his concurring opinion in the *Wohl* case to the effect that picketing is more than speech naively assumes that the minute picketing becomes more than speech, that is the minute it becomes effective, it becomes illegal. This argument parts company completely with the decisions of the United States Supreme Court upholding the right of peaceful picketing, as we shall show.

Thus, the Trial Examiner who heard the "unfair labor practice" charges which gave rise to the instant injunction, took a view in his Intermediate Report regarding the "application of Section 8(c) to Section 8(b)(4)(A)" which is completely contrary to that of the District Court and this Court of Appeals herein. (Intermediate Report of Trial Examiner A. Bruce Hunt, issued May 4, 1948, in *Matter of Print-*

ing Specialties and Paper Converters Union, Local 388, A.F.L. and Sealright Pacific, Ltd., NLRB Case No. 21-CC-13.)

In holding that Section 8(c) is applicable to Section 8(b)(4)(A) and that peaceful picketing under the circumstances embraced here is embraced within the immunizing language of Section 8(c), the Board's Trial Examiner cites *Thornhill v. Alabama*, 310 U.S. 88, 102, *Carlson v. California*, 310 U.S. 106, 113, *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287, 293, *A. F. of L. v. Swing*, 312 U.S. 321, 323, as well as the *Ritter's Cafe* and *Wohl* cases, stating:

"* * * the language of Section 8(c) specifically states that it shall be applicable to allegations of unfair labor practices 'under any of the provisions of this Act.' That statement is not ambiguous * * *

"These cases, manifestly, require the conclusion that peaceful picketing is a form of free speech. As such, peaceful picketing must be regarded as embraced within the following language of Section 8(c): 'The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form * * *'" (I.R., p. 18.)

In view of the submission by the General Counsel of the opinion in *United Brotherhood of Carpenters and Joiners of America v. Sperry* (C.C.A. 10th, decided November 2, 1948), F. (2d), after the conclusion of oral argument herein, and the complete failure of this Court to afford appellants any oppor-

tunity to comment upon said opinion before the decision of this appeal, we wish to specifically urge rehearing for those particular reasons. We desire a reasonable opportunity to point out the distinction between the *Carpenters* case and the instant one as to the facts, particularly since this Court has twice cited that opinion which holds that "The promulgation and circulation of a blacklist and the picketing of premises as the means of waging a secondary boycott which has the effect of substantially burdening or obstructing interstate commerce is not protected by the First Amendment or Section 8(c) of the act." Whatever may be said as to the correctness of the *Carpenters* decision, it is not entitled to even persuasive authority herein. We will point out to this Court, upon rehearing should this request be granted, how the Board's Trial Examiner in the *Printing Specialties* case relied upon the absence of power of the appellant labor organization to discipline employees of Sealright and West Coast for working in the presence of its pickets as a strong factor in placing these picketing activities within the immunizing language of Section 8(c).

The opinion of this Court lays down the view that picketing is "* * * something other than a mere expression of views, argument or opinion" because it constitutes "an appeal for solidarity." Concededly the effectiveness of a picket line does not lie in its value as a disseminator of information to the "unfair" employer. District Judge Rifkind made this very plain in construing Section 8(b)(4)(A) in *Douds v. Metropolitan Federation of Architects*, 75 F. Supp.

672, when he said, "The effect of a strike would be vastly attenuated if its appeals were limited to the employer's conscience."

This Court has completely disregarded the fact, called to its attention at pages 64-65 of Appellants' Opening Brief, that the language of Section 8(c) closely approximates the references in the *Thornhill* and *Carlson* cases to picketing as one of the appropriate methods for "the dissemination of information concerning the facts of a labor dispute." In *Thornhill v. Alabama*, 310 U.S. 88, the Supreme Court refers to "the means used to publicize the facts of a labor dispute, whether *by printed sign, by pamphlet, by word of mouth, or otherwise.*" *Carlson v. California*, 310 U.S. 106, hold that "The carrying of signs and banners, no less than the raising of a flag, is a natural and appropriate means of conveying information on matters of public concern," citing *Stromberg v. California*, 283 U. S. 359, the so-called "red flag" case. The reference in the *Carlson* case to "appropriate means, whether *by pamphlet, by word of mouth, or by banner,*" undoubtedly inspired the descriptive expression concerning "*written, printed, graphic, or visual form*" of disseminating views, argument, or opinion contemplated by Section 8(c).

By holding that Section 8(c) is inapplicable to picketing because it appeals for concerted action by fellow workmen, this Court has declined to follow the "free speech" doctrine of the Supreme Court, which declared in *Thomas v. Collins*, 323 U. S. 516, 537, that

“The First Amendment is a charter for government, not for an institution of learning. ‘Free trade in ideas’ means free trade in the opportunity to persuade to action, not merely to describe facts.”

V.

THE SUPREME COURT OF THE UNITED STATES IN UPHOLDING THE RIGHT OF PEACEFUL PICKETING AS A PHASE OF THE CONSTITUTIONAL RIGHT OF FREE SPEECH HAS UPHELD THE RIGHT OF EFFECTIVE AND SUCCESSFUL PICKETING PURSUANT TO A PEACEFUL BOYCOTT SO LONG AS THE PICKETING IS PEACEFUL.

In *Thornhill v. Alabama*, 310 U. S. 88, the statute which the Supreme Court invalidated as abridging the right of free speech did not refer to “speech” at all. It prohibited any one from going near a place of business for the purpose of influencing or inducing other persons not to do business with that particular establishment; in other words, to boycott the particular place. Under this statute the kind of picketing which this Court seems to approve was not forbidden, that is to say, the mere carrying of a banner somewhere making an announcement of some kind, possibly of the existence of a labor dispute, but without any effect whatever upon passersby. The statute prohibited the boycott of a place of business by a picket line for the purpose of preventing the patronage of that particular place of business, and it was this *prevention of patronage* which the Supreme Court was referring to when the Court said at page 102:

“In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the constitution,”

And on pages 104, 105, the Court said:

“Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion. We hold that the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion embodied in Section 3448.”

Bear in mind that the statute as set out on pages 91 and 92 of the decision says nothing about conversation nor does the summary of the complaint against petitioner, found at page 92, refer to anything done by the picket except that he loitered and picketed for the purpose of hindering, delaying and interfering with the business of the party picketed. And on page 99 the Court, in referring to the purpose of the picketing, as understood by the Supreme Court in this decision upholding picketing as a constitutional right, said, “the purpose of the described activity was concededly to advise customers and prospective customers of the relationship existing between the employer and its employees and thereby to induce such customers not to patronize the employer.”

And on page 100 the intention is again referred to in this language, "An intention to hinder, delay or interfere with a lawful business, which is an element of the second offense, likewise can be proved merely by showing that others reacted in a way normally expectable of some upon learning the facts of a dispute."

This would clearly refer to union members and to their natural reaction to a picket line as referred to by this Court in the last paragraph on page 4 of the opinion. That the Supreme Court well understood that the picketing might be effective and might cause damage to the person picketed is clearly shown on page 104 where the Court said:

"It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group on society."

It is clear then that the Supreme Court of the United States understood perfectly the rule which it was laying down in the *Thornhill* case, and there is no harm in recalling that there was no dissent from this opinion,—all the justices concurring except Justice McReynolds. The picket line as a means of protecting the economic interest of the workers has been in use for a long time, for generations in fact. And to

borrow the language of this Court again, the Supreme Court of the United States in the Thornhill decision was not so naive as to misunderstand or misconstrue in any way the effect of a peaceful picket line.

It is idle to discuss the constitutional right of peaceful picketing as if it includes only futile and ineffective utterances. The right of peaceful picketing is protected by the Bill of Rights and by the Supreme Court of the United States in a dispute by a union "deemed by them to be relevant to their interests" (*A. F. of L. v. Swing*, supra, at page 326), the language being that of Mr. Justice Frankfurter, the author of the opinion in the *Ritter's Cafe* case.

In fact, there is no case with which the writer is familiar where the right of absolutely futile, ineffective, sterile picketing has been adjudicated. Nor has there ever been any occasion for such adjudication. When striking workers give up their days to the carrying of a banner they are not doing it for fun. They are doing it to enlist sympathy in their particular battle. In some circumstances their appeal is primarily to the public and in other cases, as in the one at bar, they are appealing to their fellow workers. In either case they intend and expect the picketing to be effective.

VI.

THE MISINTERPRETATION AND MISCONCEPTION BY THIS COURT OF THE RIGHT OF PEACEFUL PICKETING SEEKS TO OVERRULE THE SUPREME COURT OF THE UNITED STATES AND TO NULLIFY THE PROVISIONS OF THE FIRST AMENDMENT.

Fifty years ago a decision of this Court disapproving the right of picketing for the purpose of interfering with business would have been readily understood. But in this year of 1948, in view of the decisions of the Supreme Court of the United States for the last ten years, beginning with the *Senn* case (301 U. S. 468, decided May 24, 1937), the decisions of federal Courts holding that under the Taft-Hartley Act peaceful picketing of the type involved here can be enjoined are simply incomprehensible.

And the manner in which this conclusion is arrived savors of the magical. The definition of the physical act of picketing, as set out in the decision of this Court herein and of the Court of the Second Circuit in the *Sperry* case referred to by this Court, does not vary from that of the Supreme Court of the United States in the *Senn*, *Thornhill*, *Meadowmoor*, *Swing*, *Angelos*, *Wohl* and *Ritter's Cafe* cases, nor in fact could the definition be changed because picketing is an objective act familiar to all of us. This Court, in the last paragraph on page 4 of the decision, correctly describes certain features, as for instance, that picketing may be something more than a mere expression of views, argument or opinion, that it frequently or habitually constitutes an appeal for solidarity and that workers are reluctant to cross a picket line. All

of the decisions of the Supreme Court of the United States referring to picketing have recognized these aspects and characteristics, and it is with this full recognition that the Supreme Court has upheld the right of peaceful picketing as a constitutional right. Where the right of picketing has been limited by the Supreme Court it has never been because of the effectiveness of peaceful picketing in a dispute involving employment relations for the purposes of collective bargaining. In the *Meadowmoor* case, the picketing was enjoined because of the violence, the threat of which the Court found was still in existence. But the Court made it clear that the restraint must cease the moment the picketing resumed a peaceful character. In the *Ritter's Cafe* case, picketing was not prohibited because it was effective, because workers refused to cross the picket line, or because it would cause injury. The picketing of one particular place of business was enjoined for the sole reason that that particular business was not within the *nexus* of the dispute.

In the *Allan-Bradley v. Local No. 3* case (325 U. S. 797) a boycott by the workers in their own interest was held lawful, the prohibition going only to action by the union on behalf of employers in a program of price fixing and market control.

But enough of generalization. The picketing involved here was directed at the product of a struck employer. It was not even directed personally at the carriers or the customers in whose possession the product was found. But, assuming that this was

actual picketing pursuant to a secondary boycott, it was the precise type of secondary boycott in which the Court upheld the right of peaceful picketing in *Milk Wagon Drivers v. Meadowmoor Dairies* so long as it was peaceful, and in *Bakery Pastry Drivers v. Wohl* which was expressly affirmed in the *Ritter's Cafe* case (at page 727) for the evident purpose of making it clear that the limitation in the *Ritter's Cafe* decision did not go to the extent of prohibiting a secondary boycott.

And the picketing at bar was the exact type which was upheld by the Supreme Court of California by a vote of six to one in the case of *In re Blaney*, 30 Cal. (2d) 643. While that decision is not binding upon this Court, its language is extremely persuasive. It cites the decisions of the Supreme Court of California, but also cites and relies upon the same decisions of the Supreme Court of the United States on which appellants here place their reliance.

VII.

THE PICKETING AT BAR WAS NOT FOR AN UNLAWFUL PURPOSE.

The expression "picketing for an unlawful purpose" is frequently used in cases of the type of the one at bar. In the *Blaney* case, above referred to, the Supreme Court of California made this very pertinent comment: "And the purpose of the economic pressure and the means used to exert it must be lawful (citations), but that proposition poses the question

in terms of results. Rather it is merely stating the problem in other words. The question still remains as to what purposes or what means may be declared unlawful by the legislature or the Courts without violating the provisions of the Constitution." The Supreme Court of California then proceeds to cite the decisions of the Supreme Court of the United States which we have cited to this Court in the case at bar, namely, the *Meadowmoor Dairy* case where the means employed included extreme violence, the *Ritter's Cafe* and *Wohl* cases, the *Swing* case and *Near v. Minnesota*. And the Supreme Court of California, as above stated, proceeded to hold picketing of the exact type of that in the case at bar to be in the exercise of the constitutional right of free speech under the First Amendment.

Let us see what we mean—"unlawful purpose." The unlawful purpose in the case at bar is very evidently the violation of the Taft-Hartley Act. If picketing and violation of a statute is picketing for an unlawful purpose, then the picketing in *Thornhill v. Alabama* was for a like unlawful purpose. The language of the Alabama statute was, for the purpose of our present discussion, completely analogous with the language of the Taft-Hartley Act because it prohibited picketing for the purpose of causing injury to the person picketed. Similarly, the picketing in the *Blaney* case was in violation and defiance of the California Hot Cargo Act which language is to the same purport, so far as our purpose is concerned, as that of the Taft-Hartley Act.

In *Swing v. A. F. of L.*, 312 U. S. 321 [85 L. Ed. 855], the picketing in a controversy other than a dispute between an employer and his own employees was contrary to the public policy of the State of Illinois and therefore against public policy as the term seems to be understood in the case at bar.

The Court will note that in the *Thornhill* case while the picketing was in violation of the statute of the state of Alabama, the Supreme Court upheld the right to picket as a constitutional right, and annulled the statute. In the other cases mentioned, the right to picket was upheld under the constitutional guarantee. In the case at bar, we have argued that if Section 8(c) is read with the remainder of the provisions relied upon, the picketing will not be in violation of the statute, since it will come under the exception, but that if it is held (as this Court has held) that Section 8(c) has no application, then, since the picketing is clearly the exercise of a constitutional right, this portion of the statute must fall.

With regard to the connection of Section 8(c) which this Court held to have no application, we may again remind the Court that the general counsel and his attorneys not only believe that Section 8(c) does apply but that they apparently consider it vital to their case since they injected into the findings a description of the picketing as (impliedly) containing a threat of reprisal and promise of benefit.

The reliance of the attorneys for the Board upon the text of the Taft-Hartley Act and the congressional

discussions which accompanied its formulation and passage makes out a clear case of conflict between the Taft-Hartley Act and the Bill of Rights. The Bill of Rights says that workers along with everybody else have the right of free speech and the Supreme Court of the United States has interpreted this right of free speech as the right to publicize a labor dispute peacefully and within the economic *nexus* for the purpose of influencing other workers and the public to withdraw or withhold their patronage from the picketed concern. Along comes the Taft-Hartley Act and says that this type of picketing cannot be done, just as the Legislature of Alabama said it could not be done, the Legislature of California under the Hot Cargo Act said it could not be done, or public policy of the State of Illinois said it could not be done, and yet these statutes and this public policy were held by the Supreme Court of the United States to be inferior and subordinate to the Bill of Rights. The same ruling must be applied to the Taft-Hartley law.

VIII.

THE ECONOMIC JUSTIFICATION FOR PICKETING THE PRODUCT IN THE WOHL CASE ALSO SHOULD HAVE BEEN FOUND TO EXIST HEREIN.

This Court has declined to apply the holding in *Bakery Drivers Local v. Wohl*, 315 U.S. 769, to the present case upon the assumption that the facts and circumstances there were "peculiar" and "extraordinary". It finds that in the *Wohl* case, the Supreme

Court thought "it was practically impossible for the union to make known its legitimate grievances" except by means of a product boycott.

Without being ready to admit that the *Wohl* case stands for so narrow a proposition, we urge that the identical economic justification for a product boycott appears in the instant case. It apparently was not considered although called to this Court's attention at pages 8 and 9 of appellants' reply brief. The nature of Sealright products—milk bottle caps and paper food containers—like the bakery goods in the *Wohl* case—causes them to lose their identity as to place of manufacture before reaching the ultimate consumer. The District Court injunction forbidding the Sealright strikers from following the subject matter of the dispute, set apart a particular enterprise—Sealright—and freed it from all effective picketing in the same fashion as the New York injunction in the *Wohl* case, concerning which Mr. Justice Douglas said:

"If the principles of the *Thornhill* case are to survive, I do not see how New York can be allowed to draw that line."

IX.

NOTHING CONTAINED IN THIS OPINION INDICATES THAT THE "CLEAR AND PRESENT DANGER" TEST WAS EVEN CONSIDERED.

Despite repeated references by appellants to decisions of the Supreme Court holding that labor speech, including peaceful picketing, may not be curtailed in

the absence of a "clear and present danger" of the gravest abuses endangering our form of society as a whole, the opinion is completely silent as to this fundamental argument. (Op. Br. 44-45, 57; Reply Br. 10.)

In the *Carlson* case, the Supreme Court of the United States declared:

"The power and duty of the State to take adequate steps to preserve the peace and protect the privacy, the lives, and the property of its residents cannot be doubted. But the ordinance in question here abridges liberty of discussion under circumstances presenting *no clear and present danger* of substantive evils within the allowable area of State control."

(310 U.S. at 113, emphasis added.)

The power of Congress under "The Commerce Clause"—like the police power of a State—is subject to the basic guarantees of the Bill of Rights.

In *Bridges v. California*, 314 U.S. 252, the Supreme Court again pointed out that restrictions upon peaceful picketing were subject to the exacting test applied to all forms of curtailment of the cognate rights assured by the First Amendment:

"* * * very recently we have also suggested that '*clear and present danger*' is an appropriate guide in determining the constitutionality of restrictions upon expression where the substantive evil sought to be prevented by the restriction is 'destructive of life or property, or invasion of the right of privacy.' *Thornhill v. Alabama*, 310 U.S. 88, 105, 60 S. Ct. 736, 745, 84 L. Ed. 1093 * * *"

Government's power to regulate labor union activity as an exercise of its duty to safeguard and promote the public welfare must not trespass upon the domains set apart for free assembly and free speech unless grave danger to paramount interests would thereby be prevented. This rule is equally applicable to laws aimed at preventing union officers or members from *platform speaking* (*Hague v. C.I.O.*, 307 U.S. 496; *Thomas v. Collins*, 323 U.S. 516), *handbilling*, *Schneider v. Town of Irvington*, 308 U.S. 147), or picketing (*Thornhill*, *Carlson*, *Wohl*, *Swing* and *Angelos* cases, *supra*). Yet, nowhere does this Court's opinion indicate that any consideration was given to this test in passing upon the validity of Section 8(b)(4)(A).

It is significant that the opinion does refer to Section 8(b)(4)(A) as a statute which “* * * *broadly sweeps within its prohibition* an entire pattern of industrial warfare deemed by Congress to be harmful to the public interest”. (p. 4.) Under the “clear and present danger” rule, as applied in *Thornhill v. Alabama* and *Carlson v. California*, such a statute “which does not aim specifically at evils within the allowable area of state control, but on the contrary *sweeps within its ambit* other activities that in ordinary circumstances constitute an exercise of freedom of speech* * *” must be declared unconstitutional, for “The existence of such a statute results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as coming within its purview.”

While it is true, as the opinion states (p. 4), that "The wisdom or policy of circumscribing the use of the weapon is not, of course, a matter with which the Courts are entitled to concern themselves", nonetheless this Court cannot escape the duty laid down for it by the Supreme Court in *Thomas v. Collins*, which said:

"* * * in our system where the line can constitutionally be placed presents a question this Court cannot escape answering independently, *whatever the legislative judgment*, in the light of our constitutional tradition. *Schneider v. State*, 308 U.S. 147, 161. And the answer, under that tradition, can be affirmative to support an intrusion upon that domain, only if *grave and impending public danger* requires this."

X.

THE ONE THING NECESSARY FOR A SOLUTION OF THE ISSUE BEFORE US IS A REALISTIC APPROACH.

The argument on which counsel for the Board relies in its opinion is that if the acts charged are violations of the Taft-Hartley law they must be enjoined. There is substantial agreement that the acts charged are violations of some of the language of the Taft-Hartley Act except as qualified by Section 8(c). The question here is no different from the question which has arisen in so many of the picketing injunction cases, namely, does the particular statute or ordinance attempt to prohibit peaceful picketing within the area of a labor dispute? The answer here cannot be any different

from the answer in cases of other statutes which have sought to do what this particular portion of this statute attempts to do.

Ever since the Taft-Hartley Act was passed it has been recognized by thoughtful lawyers not deafened by the din and commotion in favor of the enforcement of every jot and tittle of the measure that the provisions here under consideration might infringe upon the constitutional right of peaceful picketing. Articles in law journals have raised this point, and in a recent bulletin put out by the Commerce Clearing House Labor Law Reporter appears an article headed "Picketing and the Right of Free Speech", being paragraph 5120 at page 5621. Here we find a very calm and objective appraisal of the right of peaceful picketing—primary and secondary—and a suggestion that if the Taft-Hartley Act attempts to prohibit peaceful picketing—primary or secondary—it may be unconstitutional. Some of the propositions are: "If the picketing is peaceable, however, it is protected even though it does not arise in an employer-employee relationship; i.e., 'stranger' picketing is protected by the right of free speech. 'Secondary' picketing, the picketing of businesses or persons not directly involved in the labor dispute, is likewise held immune to restrictive legislation, except where the pickets leave the industrial 'area' of the original dispute to bring into it parties who are not in 'unity of interest'. * * *

The Supreme Court has held that picketing is protected notwithstanding the fact that it may induce or encourage a boycott, and, as we have seen, 'secondary'

picketing is held immune so long as it remains within the industrial area where the labor dispute arose." That change is well known to authorities on labor law and should not be ignored in the solution of the question at bar. The United States Supreme Court for a decade has upheld the right of peaceful picketing under the exact circumstances found here and for the exact purposes and with the precise effects which are found to exist in the case at bar, and the Supreme Court has upheld this constitutional right regardless of statutes or of public policy. Since these are matters of common knowledge it is extremely unrealistic to have them ignored in the decision of this case on the assumption that the Bill of Rights has been repealed or abridged by the passage of the Taft-Hartley law.

When the law was first enacted strong arguments were made to the effect that this congressional statute expressed a definite national policy which presumably would continue in effect indefinitely. On the second of last November a popular referendum was taken on a number of issues, including the issue of the Taft-Hartley Act, and the vote of the people seemed to forecast a different national policy so far as the Taft-Hartley Act is concerned. If the Taft-Hartley Act is repealed by the Eighty-first Congress, such repeal will constitute a declaration of public policy to the same extent as but no more than the original passage of the Act by the Eightieth Congress, *non constat*, but the Eighty-first Congress might re-establish the Act in certain respects, or entirely.

The above suggestions are made to indicate the soundness of a judicial policy which shall adhere to the words of the Constitution,—which cannot be amended by each successive Congress in accordance with prevailing public opinion at the time. The decisions of the Supreme Court which we have referred to, some of them unanimous like the *Wohl* case, others practically so, like the *Thornhill* case, have rested strictly and strongly on the provisions of the Constitution. We ask this Court to grant a rehearing of this case in order that the final decision may be in accordance with those constitutional principles.

Appellants respectfully pray the Court to grant a rehearing herein.

Dated, San Francisco, California,

January 7, 1949.

Respectfully submitted,

CLARENCE E. TODD,

ROBERT W. GILBERT,

ALLAN L. SAPIRO,

*Attorneys for Appellants
and Petitioners.*

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellants and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
January 7, 1949.

CLARENCE E. TODD,
*Of Counsel for Appellants
and Petitioners.*



